





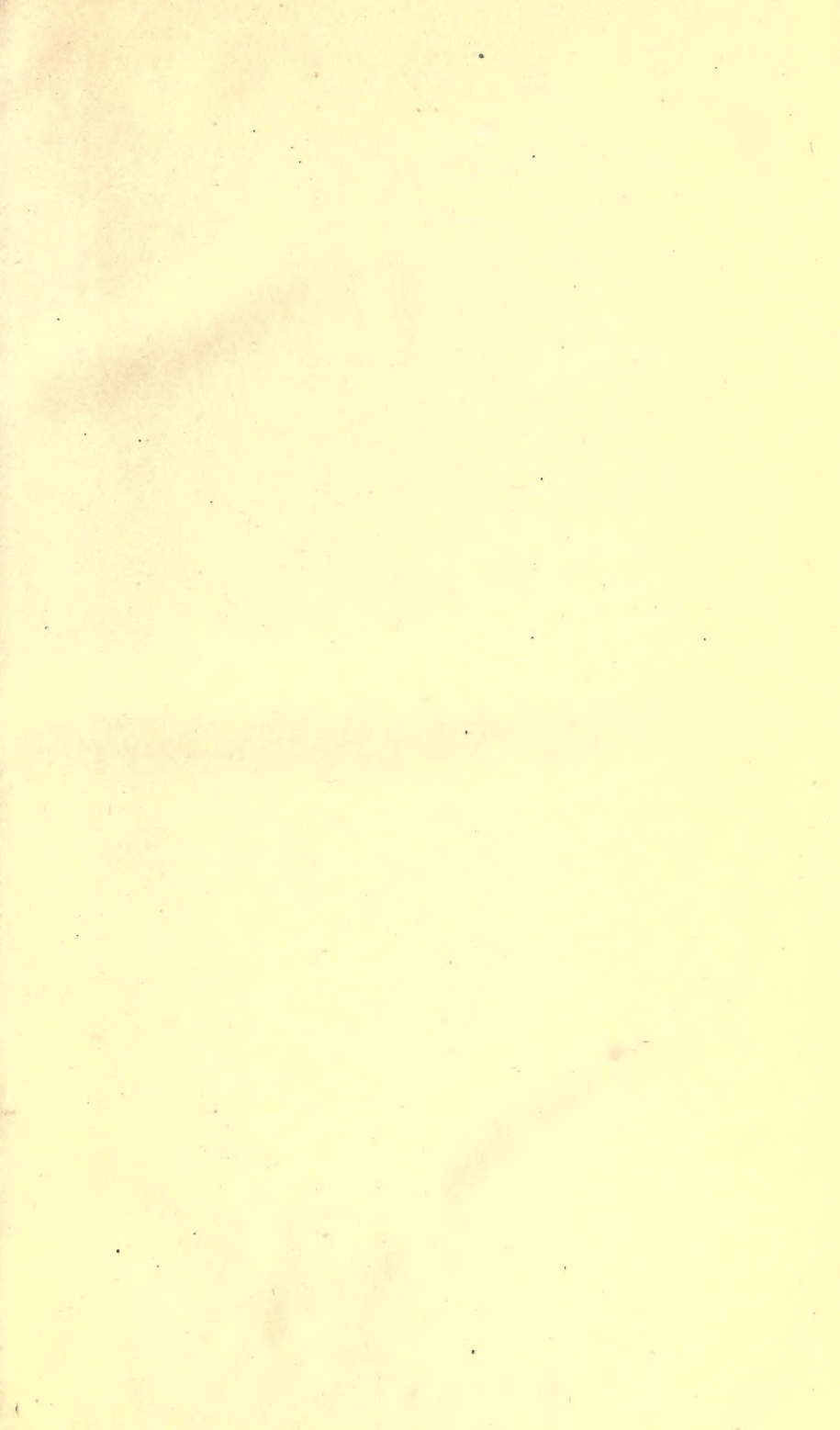
Digitized by the Internet Archive  
in 2007 with funding from  
Microsoft Corporation















New York (State) Reports. Supreme Court.

# PRACTICE REPORTS

IN THE

*Dec 12/74*

## SUPREME COURT

AND

## COURT OF APPEALS

OF THE

## STATE OF NEW YORK.

By NATHAN HOWARD, JR.,  
COUNSELLOR-AT-LAW, NEW YORK.

VOLUME XLVII.

ALBANY:  
WILLIAM GOULD & SON,  
LAW BOOKSELLERS AND PUBLISHERS.

1874.

✓

FacLib

KFN

5994

.H 6

v. 47

✓

FL

5

New Y 71

H 35

1847

v. 47

---

Entered according to act of Congress, in the year eighteen hundred and seventy-four,

By WILLIAM GOULD & SON,

in the office of the Librarian of Congress, at Washington.

---

---

THE ARGUS COMPANY,  
PRINTERS AND STEREOTYPERS,  
ALBANY, N. Y.

---



# CASES REPORTED.

	PAGE.		PAGE.
<b>A.</b>			
Adrience agt. Lagrave .....	71	Duchess County Mutual Ins. Co.	
		agt. Hachfield .....	330
		Dupuy agt. Wurts .....	225
<b>B.</b>			
Bacharach agt. Lagrave .....	385	<b>F.</b>	
Bean agt. Bowen .....	306	Fall Brook Coal Company agt.	
Becker agt. Howard .....	423	Lynch .....	520
Becker agt. Holdridge .....	429	Farmer agt. Robbins .....	415
Blott agt. Rider .....	90	First National Bank of Platts-	
Board of Commissioners of Pi-		burgh agt. Bush .....	78
lots agt. Spofford .....	479	First National Bank of Troy agt.	
Boyd, Exr., &c., agt. De La		Cooper .....	108
Montaigne .....	433	Fisher agt. World Mutual Life	
Brennan agt. Mayor, &c., New		Ins. Co. ....	451
York .....	178	<b>G.</b>	
Butterfield agt. Radde .....	535	Gibson agt. Van Derzee .....	231
<b>C.</b>			
Casper agt. O'Brien .....	80	<b>H.</b>	
Chapman agt. Rose .....	13	Hadley agt. Barton .....	481
Cheever agt. Saratoga Co. Bank,	376	Handley agt. Quick (two causes),	233
Christy agt. Kiersted (two		Hale agt. Omaha National Bank,	201
causes) .....	467	Hovey agt. Rubber Tip Pencil	
Cooley agt. Decker .....	188	Co. ....	289
Crofut agt. Brandt .....	263	<b>I.</b>	
Crill agt. City of Rome .....	398	In the Matter of Clifton .....	172
<b>D.</b>			
De Ronde agt. Olmsted .....	175	In the Matter of May and Berwin,	37
Driggs agt. Smith .....	215		

## Cases Reported.

	PAGE.		PAGE.
In the Matter of Owens .....	150	P.	
In the Matter of Tweed .....	162	Pacific Mail Steamship Co. agt. Commissioners of Taxes and Assessments.....	164
		Patterson agt. Patterson.....	242
K.		People <i>ex rel.</i> Davin agt. Have- meyer.....	59
Kelly agt. Bernheimer.....	62	People <i>ex rel.</i> Ford agt. Earle ..	368
Keeley agt. Erie Railway Co....	256	People <i>ex rel.</i> Martin agt. Earle (two causes).....	458
Kendall agt. Miller.....	446	People <i>ex rel.</i> N. Y. and Harlem R. R. Co. agt. Havemeyer....	494
Knoeppel agt. Kings County Fire Ins. Co.....	412	People <i>ex rel.</i> Stockwell agt. Earle .....	370
Krom agt. Levy .....	97	People <i>ex rel.</i> Tracy agt. Green,	382
Kurkel agt. Haley ...	75	People agt. Welch .....	420
		People <i>ex rel.</i> Youmans agt. Board of Supervisors of Dela- ware Co.....	24
L.		Platt agt. Stewart.....	206
Laidlaw agt. Gilmore.....	67	Powers agt. Conroy.....	84
Lathrop agt. Lathrop.....	532		
Leggett agt. Hyde.....	524	R.	
Levy agt. Lock .....	394	Rawson agt. Holland.....	292
Livermore agt. Bainbridge....	350	Reede agt. Schneider.....	379
Livermore agt. Bainbridge....	354	Reid agt. Bank of N. Y. National Banking Association .....	358
		Richardson agt. Kropf....	286
M.			
MacKellar agt. Sigler.....	20	S.	
Magnin agt. Dinsmore.....	11	Sanford agt. White.....	96
McDonald agt. James .....	474	Sheriff agt. Smith.....	470
McGuire agt. Sinclair .....	360	Slingerland agt. Bronk .....	408
Menges agt. City of Albany....	244	Smith agt. Matson .....	118
Mitchell, Executrix, agt. Ver- mont Copper Mining Co....	218	Smith agt. Mayor, &c., of N. Y.,	277
Morley agt. Stevens.....	228	Snyder agt. Davis. ....	147
		Soher agt. Fargo, &c.....	288
N.		Stern agt. Nussbaum.....	489
Newfield agt. Copperman .....	87	Stewart agt. Orvis .....	518
Norwood, Receiver, agt. Reso- lute Fire Ins. Co.....	43	Sullivan agt. Mayor, &c., of N. Y.,	491



## Cases Reported.

T.	PAGE	W.	PAGE.
Taft agt. Wright.....	1	Watson agt. Watson .....	240
Terry, Receiver, agt. Wait.....	52	White agt. McLean ...	193
Tim agt. Tim.....	253	Wheeler agt. McCabe .....	283
Trustees of Columbia College,		Williams agt. Irving .....	440
N. Y., agt. Lynch .....	273	World Mu. Life Ins. Co. agt.	
Tuton agt. Thayer .....	180	Bund "Hand in Hand".....	32



# PRACTICE REPORTS.

---

## SUPREME COURT.

AMARIAH A. TAFT agt. CAROLINE M. WRIGHT, DAVID B.  
BABCOCK AND MARGARET HILL.

*Parties — evidence — new trial — statute of limitations.*

A grantee who has parted with his title to the property in question, and who claims no interest in it, is neither a necessary nor a proper party defendant in an action by a judgment creditor to vacate the title and recover the property.

Only parties in interest are now recognized. A referee having found in favor of plaintiff against two of the defendants, and dismissed the complaint as to the third defendant Hill, as not a party in interest, the general term affirms said dismissal, and reverses the judgment as to said two other defendants.

A referee having found facts against undisputed evidence, and neglected to find facts in accordance with such evidence given by plaintiff's own, witness, in favor of defendants, as to a legacy of \$1,500, and interest, which should have been credited to defendants Wright and Babcock, the judgment was reversed and a new trial ordered as to those defendants, for that reason, and also that the action was barred by the statute of limitations.

The Code, § 91, sub. 6, requiring a "discovery by the aggrieved party of the facts constituting the fraud," within six years previous to action, does not require personal knowledge of the fact.

If he has made a discovery of the essential facts by an attorney employed for that purpose, more than six years before action, the notice or knowledge thus obtained by the attorney is sufficient to charge his client. And the statute is well pleaded, especially where as here, there are indications that the transactions were in fact well known to the client.

---

Taft agt. Wright.

---

*Second District, General Term, Argued December, 1873.*

*Before Justices BARNARD, GILBERT and TAPPEN.*

PLAINTIFF'S points as to joinder of defendants Hill and Babcock, cited *Story Eq. Pl.* (§ 232); *Code*, § 118; *Brady* agt. *McCoskey*, (1 *Comstock* 222 and cases); *Bennett* agt. *McGuire* (48 *Barb.*, 625, 636); *Lawrence* agt. *Bank of Rep.* (35 *N. Y.*, 320-324); *Shaver* agt. *Brainerd* (29 *Barb.*, 25); *Jeffries* agt. *Cochrane* (47 *Barb.*, 557); *Murray* agt. *Ballou* (1 *John. Ch.*, 576, 579 and cases.)

*R. H. Crittenden*, for Mrs. Hill, cited *Hubbell* agt. *Meigs* (50 *N. Y.*, 489, and cases); *Spicer* agt. *Hunter* (14 *Abb. Pr.*, 4); *Code* (§ 111, 118).

The old equity distinction of necessary and proper parties is abolished by the Code, which allows only parties in interest. The cases *contra* were commenced before the Code.

*Lewis Hurst*, for defendant Babcock.

This defendant paid the \$10,000 mortgage in question to the defendant Caroline M. Wright, after the commencement of this action, but after the order of this court, dissolving the preliminary injunction, which had previously restrained him from paying it, had been officially served on him.

That order was judicial notice to him that plaintiff had no equity. He was therefore under no further moral or legal obligation to leave his property incumbered and his bond unpaid for the plaintiff's benefit. The judgment, therefore, requiring him to pay the amount over again to the plaintiff, must be reversed.

*Wm. W. Badger*, for defendant Caroline M. Wright.

I. The action is barred (*Code*, § 91, *sub.* 6); John H. Pier-son "made a discovery of the facts" of the conveyance in



---

Taft agt. Wright.

---

question by the examination of John B. Wright, October 16, 1862.

If he did this by attorney it is not necessary that he have personal notice or knowledge of it, though it is a moral certainty that he had such in this case (*Borst agt. Corey*, 15 *N. Y.*, 505; *Mayne agt. Griswold*, 3 *Sandf.*, 482; *Foot agt. Farrington*, 41 *N. Y.*, 164; *Baker agt. Bliss*, 39 *N. Y.*, 70; *Griffiths agt. Griffiths*, 1 *Hoff. Ch.*, 156).

II. The referee has found and allowed to Mrs. Wright all that she claimed, except the two items as to the legacy, and has refused to find those items, and concludes that the legacy money, though received by Wright, was appropriated to other uses, *of which there is not a particle of proof in the case* (*Beck v. Sheldon*, 48 *N. Y.*, 369).

The remarkable result has therefore been reached in a suit in equity, that a lady's legacy, received from her grandfather, is adjudged to her husband's creditors.

III. The referee apparently entirely overlooked the evidence of Mrs. Hill as to the legacy money, a witness called by plaintiff, and only alluded in his criticism to that of Mrs. Wright.

It is respectfully submitted that all the evidence on that subject, taken together, and the absence of any conflicting evidence or fact is sufficient to require the finding as requested by defendant's counsel.

It is also immaterial whether the legacy money went, in fact, into the real estate or not, as the debt for it and Mrs. Wright's equity is the same, whether it did or not.

As John B. Wright plainly had the money in his possession up to 1860, the burden of proof is on the plaintiff to show its payment to Mrs. Wright in some other manner than that alleged by her.

In *Fordham agt. Smith* (44 *How. Pr. R.*, 472), the court of appeals say: "A referee cannot disregard undisputed evidence, nor judicially infer something different therefrom to be true, of which there is no evidence" (*Sheldon agt. Shel-*

---

Taft agt. Wright.

---

don, 51 *N. Y.*, 355, and three cases cited there; *Lomer* agt. *Meeker*, 25 *N. Y.*, 363; *Dolsen* agt. *Arnold*, 10 *How. Pr. R.*, 528; *Siebert* agt. *Erie*, 49 *Barb.*, 583).

IV. The ADEQUACY of the consideration is not open to question in a case where any is paid in good faith (*Jackson* agt. *Peck*, 4 *Wend.*, 300; *Babcock* agt. *Eckler*, 24 *N. Y.*, 626; *Phillips* agt. *Wooster*, 36 *N. Y.*, 412; 3 *Abb.*, *N. S.*, 475).

But, in fact, the property was then worth no more than the mortgages on it.

Two very competent witnesses, Samuel Hutchinson and Thomas T. Buckley, value it then at only \$18,000, and Hondlow's statement of a larger sum is refuted by his other statement.

It is public history that the inflation of values began in November, 1862, by the passage of the legal-tender act.

The Coe deeds, therefor, conveyed no value whatever, but a naked title only.

*De minimis non curat lex.*

V. It is, therefore, entirely immaterial whether or not John B. Wright was indebted or insolvent in December, 1861, as he merely executed a trust by conveying to Mrs. Wright her own property in satisfaction of her claims to the fee as purchased for her with her money.

The law of voluntary conveyances has, therefore, no application to the present case. There was no gift of the Pierrepont street property, nor any portion of it, at any time.

Fraudulent intent in such a case, where any consideration exists, must be proved as fact by evidence, and cannot be presumed as matter of law, and must be proved against the grantee as well as the grantor (*Dygert* agt. *Remerschinder*, 32 *N. Y.*, 629; *affirming same case*, 39 *Barb.*, 417; 2 *R. S.*, 137, § 4; 24 *N. Y.*, 628, 629; *Auburn Bank* agt. *Fitch*, 48 *Barb.*, 344; *Holmes* agt. *Clark*, 48 *Barb.*, 237; *Waterbury* agt. *Sturtevant*, 18 *Wend.*, 353; *Carpenter* agt. *Muren*, 42 *Barb.*, 300; *Ruhl* agt. *Phillips*, 48 *N. Y.*, 125; 14 *Johns.*,

---

Taft agt. Wright.

---

493; 18 *Johns.*, 515; 2 *Johns. Ch.*, 35; *Bilsborow* agt. *Titus*, 15 *How. Pr. R.*, 95; *Schaffner* agt. *Reuter*, 37 *Barb.*, 44).

VI. One creditor cannot sue another creditor for assets given in payment of debt. If John B. Wright had any interest in the property in question, it passed by his general assignment, made May 2, 1862, and can only be reached by his assignee, or in some action or proceeding to which said assignee is made a party (*Shaver* agt. *Brainard*, 29 *Barb.*, 25; *Vanderpoel* agt. *Valkenburgh*, 6 *N. Y.*, 199; *Laws of 1858*, ch. 314, p. 506).

VII. No action can be maintained against a defendant in two capacities, as personally and as administratrix (*McMahon* agt. *Allen*, 1 *Hilton*, 103; *affirming same*; 12 *How.*, 39; *Landau* agt. *Levy*, 1 *Abb.*, 376; *Latting* agt. *Latting*, 4 *Sandf. Ch.*, 31).

VIII. John B. Wright's statements at the time, against his interest, and admitting his agency, are part of the *res gestæ*, and competent on the question of fraudulent intent (*Crary* agt. *Sprague*, 12 *Wend.*, 41; *Kelly* agt. *Campbell*, 1 *Keyes*, 29; *Happy* agt. *Mosher*, 47 *Barb.*, 501; 6 *Cow.*, 99; 1 *Paige*, 15; 34 *Barb.*, 275; *Tuttle* agt. *The People*, 36 *N. Y.*, 431; *Gibney* agt. *Marhcy*, 34 *N. Y.*, 301; 44 *Barb.*, 542, 547; 1 *Greenl. Ev.*, § 199, 171; *Spaulding* agt. *Hallenbeck*, 39 *Barb.*, 79; *Fox* agt. *Parker*, 44 *Barb.*, 541; *Meserole* agt. *Archer*, 3 *Bosw.*, 376; *Jackson* agt. *Van Dusen*, 5 *Johns.*, 144; *Jackson* agt. *McVey*, 15 *Johns.*, 234; *Pitts* agt. *Wilder*, 1 *N. Y.*, 525; 5 *Paige*, 104; 10 *Paige*, 170; *Adams* agt. *Davidson*, 10 *N. Y.*, 309; *Woodhouse* agt. *Jones*, 5 *N. Y. Leg. Obs.*, 20; 2 *Abbot's Digest*, 697, 1170).

TAPPEN, J.—The plaintiff by assignment in the year 1864, became the holder of a judgment recovered by one Pearson against John B. Wright on the 7th March, 1862, for \$5,200.

The complaint is in the nature of a creditor's bill and seeks to have adjudged as fraudulent and void, a conveyance by Wright to his wife, the defendant Caroline, through one Coe



---

Taft agt. Wright.

---

on December 26th, 1861, of the house and lot 40 Pierrepont street, Brooklyn. Also to have certain other property or securities which came to the defendant Caroline on a sale of that property decreed to be the property of the judgment debtor.

The Pierrepont street property so conveyed by the debtor, was subject to two mortgages to one Spies, on which a balance of \$8,000 was unpaid and to a mortgage made in November, 1859, for the sum of \$12,000 by Wright to the defendant Mrs. Hill, his mother-in-law, and by her at or about the same time, assigned without consideration, to her daughter, the defendant Caroline Wright.

Mrs. Wright sold the Pierrepont street property in April, 1863, and invested \$13,000 arising from the sale, in the purchase of the premises 60 Montague street, and took conveyance thereof to herself; and in September, 1864, she sold the Montague street property for \$8,000 in cash and \$10,000 in bond and mortgage, which she held at the commencement of this action and which plaintiff seeks to make subject to the payment of his judgment against Wright. Wright in May, 1862, made a general assignment for the benefit of creditors, and had been for some time previous thereto in an insolvent condition. He died in the year 1864.

Mrs. Wright insists that her husband was her debtor and that there was full value by reason of such indebtedness, for all property which came to her by the conveyance and mortgage in question.

It is insisted also by her, that the statute of limitations bars this action; and further that by reason of a general assignment for the benefit of creditors, made by Wright in May, 1862, the right to bring an action of this nature is by the act of 1858, chapter 314, page 506, vested in the assignee and that a judgment creditor cannot maintain it.

With respect to the Pierrepont street property, Mrs. Wright claims that the conveyance to her was in execution of a trust; that it had been purchased in the year 1858, from



---

Taft agt. Wright.

---

one Spies for \$18,000, of which \$6,000 was paid down and two mortgages given to Spies, one for \$9,500 and one for \$2,500 for the balance of purchase money.

These mortgages were reduced by a payment of \$2,500 August 25th, 1859, and \$3,500 May 2d, 1860. The defendant Mrs. Hill, took an assignment of the \$2,500 mortgage to secure \$2,000 which she advanced in making these payments.

And the principal question here is, who was the real party in interest in buying the Pierrepont street property, and whether the moneys used in making the purchase and in paying off the Spies mortgage, were the moneys of Wright or equitably of his wife.

If it can be substantiated that Mrs. Wright's equitable claims against her husband, were in amount equal to the sum she realized from the Pierrepont street property, \$13,000, it follows that there was a valuable consideration for the conveyance to her, and such conveyance is valid and effectual if made by reason of such indebtedness.

The referee has found that the indebtedness of Wright to his wife, was about \$10,490.59, which she was entitled to retain to her own use out of the \$13,000 net proceeds of the Pierrepont street property, leaving a balance in her hands of \$2,509.41, which he adjudged to have been received and held by her as an equitable trustee, bound to account therefor to any pursuing creditor of her husband.

Both the plaintiff and defendant excepted to the findings and each brings an appeal; the plaintiff claiming that the credits to be allowed Mrs. Wright, should not exceed \$4,000 or thereabouts.

Mrs. Wright, among other claims against her husband, presented one for \$1,500, being the amount of a legacy from her grandfather, which she avers came to her husband's hands in January, 1857; that certain profits arising thereon, came to \$500, which was used by her husband by her request in making a payment on the Spies mortgages on August 25th, 1859.

---

Taft agt. Wright.

---

These items were not allowed by the referee, but were rejected by him on the ground that the proof that Wright received this legacy was uncertain, and if he did receive it, that it was used by him for his wife in other ways.

Mrs. Hill, under examination at the trial of this case, as a witness called by plaintiff, testified, that Wright received the \$1,500 legacy and invested it in Ocean Bank stock about January, 1857, that it was afterward sold and the proceeds used to pay the \$3,500 Spies mortgage before referred to.

From a perusal of the evidence it seems to be sufficiently established, that the defendant, Caroline, should have credit for this legacy and for what it produced in income; and with these sums allowed as owing to her from her husband, it will appear that the \$13,000 realized by her from Pierrepont street property on its sale by her in April, 1863, did not entirely suffice to repay her the money and interest which her husband had received for her use.

From this conclusion it follows that there was no balance in her hands, as found by the referee, for which she could be called on to account to other creditors of her husband.

With respect to the statute of limitations, the Code, section 91, subdivision 6, provides a limitation of six years for the bringing of an action for relief on the ground of fraud. The cause of action not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.

The plaintiff prosecutes as the assignee of John H. Pierson, the judgment creditor, who took proceedings by a bill in equity against the judgment debtor for a discovery and to enforce payment of the judgment. These proceedings were pending from May, 1862, to October, 1862. The judgment debtor was examined therein on the 16th of October, 1862, and stated that he had conveyed the dwelling-house on Pierrepont street to Frederick A. Coe.

Mr. Sidney Webster testified that he was Pierson's attorney in that proceeding, and that the fact or impression remaining

---

Taft agt. Wright.

---

in his memory is that Coe was in collusion with Wright to prevent Wright's creditors getting access to his property.

Of course when the plaintiff took the judgment from Pierson he took it charged with the notice to or knowledge of Pierson, touching the conveyance, which is claimed to be fraudulent.

The attorney of Pierson had this notice or knowledge as early as October, 1862, and his notice or knowledge obtained in a proceeding instituted for the benefit of Pierson, is sufficient to charge him therewith.

With respect to information to Pierson, the same witness says, "judging from the usual course of my business I must have informed him of what happened, but am unable to say when or how." There are other indications that the transactions of Wright, with respect to the property, were known to Pierson as a prosecuting creditor during the year 1862. As this action was commenced in May, 1871, more than six years thereafter, the statute was well pleaded, and is a bar to the maintenance of the action (*Gates agt. Anderson*, 37 *N. Y.*, 657; *Foot agt. Farrington*, 41 *id.*, 164).

The remaining point that in case of assignment for benefit of creditors, the assignee being vested with the title, is the only person qualified to bring the action, is not well taken.

Pierson was a judgment creditor of Wright's before the assignment, and the assignee took subject thereto (*Stanwix Bank agt. Leggett*, 51 *N. Y.*, 552; *Chautauque Bank agt. Risley*, 19 *id.*, 375).

Exceptions were taken to the rulings of the referee in admitting or receiving evidence, but they have not been considered in view of the conclusion reached on the main question.

Upon the whole case and the testimony, it seems quite evident that at the time Mrs. Wright took the Pierrepont street property, it was claimed by her that her husband had invested in it the proceeds of her separate estate, and that he was, in fact, her debtor to a considerable sum, and that at the time of the conveyance to her, the value of the property did not



---

Taft agt. Wright.

---

exceed the mortgage liens upon it and the amount of her equitable claims.

It was purchased of Spies, in 1858, for \$18,000, and its market value was but little greater in December, 1861, when conveyed to the defendant.

When sold by Mrs. Wright, in the spring of 1863, it brought \$21,000, the appreciation of \$3,000 over the value of 1858, being simply the result of the impetus or inflation given to the values of all kinds of property by reason of the issue of paper money.

The judgment should be reversed and a new trial ordered at special term, costs to abide event, but as to the defendant, Margaret Hill, the judgment dismissing the complaint should be affirmed, with costs.



---

Magnin agt. Dinsmore.

---

N. Y. SUPERIOR COURT.

ELISE MAGNIN *et al.* agt. WILLIAM B. DINSMORE, President  
of the Adams' Express Co.

*Costs — extra allowance.*

Where a defendant, after issue joined, served upon the plaintiffs an offer to allow judgment to be taken against him for a certain sum with costs, and the plaintiffs failed to recover a more favorable judgment, the defendant, in such case, is not entitled to an extra allowance, although it be conceded that the action was a difficult and extraordinary one.

*Special Term, November, 1873.*

THE plaintiffs commenced an action against the defendant, as a common carrier, to recover the sum of \$2,500. About a year after issue was joined, the defendant served upon the plaintiffs an offer to allow judgment to be taken against him for fifty dollars, with interest and costs. The plaintiff, on the trial, recovered only that amount. The defendant moved for an allowance.

*Charles M. Da Costa*, for the motion.

*C. Bainbridge Smith*, opposed.

SEDGWICK, J.—The plaintiffs have recovered a judgment for more than fifty dollars, and are, therefore, the prevailing party upon the judgment declared by section 303 to be entitled to the costs. The costs are allowed, of course, to them; section 304. Section 307 fixes the amount of the costs, by giving different sums for the different stages of the

---

Magnin agt. Dinsmore.

---

proceedings in the action. Under section 309, the plaintiffs would further be entitled (as this is conceded to be a difficult and extraordinary case) to an allowance not exceeding five per cent, upon the amount of the recovery. This allowance is not an indemnity for the expenses attending a particular stage of the action, such as proceedings before notice of trial, fifteen dollars or twenty-five dollars, or for proceedings after notice of trial, fifteen dollars. It is given at the time when the party is entitled to enter judgment for an indemnity for the expenses of the action, as a whole, from first to last. We have stated above the general rule. Because, however, the defendant served an offer for judgment, as favorable to the plaintiffs as the judgment they are now entitled to enter, they, by section 385, cannot "recover costs, but must pay the defendant's costs *from the time of the offer.*" As we think that an allowance under section 309 is not given for a part of the action, it follows that defendant's costs from the time of the offer, say before notice of trial or after, do not, within the meaning of this section, include an allowance.

There is no way of apportioning it under the Code as it stands.

If an allowance were ordered to defendant, it would have to be such a one as the Code authorized to be given to him from the time of his offer. As I do not think the Code has made such a provision, the motion for the additional allowance to the defendant must be denied, but without costs.

---

Chapman agt. Rose.

---

## COURT OF APPEALS.

ALPHEUS CHAPMAN, appellant, agt. SILAS ROSE, respondent.

*Negligence—fraud in executing promissory note—liability of maker.*

It is now the settled law that mere *negligence*, however gross, is not sufficient to deprive a party of the character of a *bona fide holder*. There must be proof of bad faith—that alone will deprive him of that character.

Where the evidence on the trial tended very strongly to show that the signature of the defendant to the note sued upon, was obtained from him through a very gross and fraudulent imposition perpetrated upon him by one M.; that when he signed it he supposed he was signing a duplicate order for a hay-fork and two grappling pulleys, for which he had engaged to pay, and was signed as such without examination or reading it, upon the statement of M., with whom he was dealing, that such was its character.

*Held*, there does not appear to have been any physical obstacle to the defendant's reading the paper before he signed it. He understood that he was signing a paper by which he was about to incur an obligation of some sort, and he abstained from reading it; and having signed an obligation without ascertaining its character and extent, which he had the means of doing, upon the representation of another, he put confidence in that person, and if injury ensued to an innocent third person, by reason of that confidence, his act was the means of the injury and he must answer for it.

*April, 1874.*

THIS cause was tried at a circuit at Newburgh, in November, 1871, before Hon. JOSEPH F. BARNARD, J., and a jury. The jury rendered a verdict in favor of the defendant and against the plaintiff, for costs. On the trial it appeared that on the 1st day of February, 1871, a person representing himself as Alfred E. Miller, came to the defendant, a farmer, at his barn in the town of Warwick, Orange county, and



---

Chapman agt. Rose.

---

asked him to take an agency for the sale of a patent hay-fork, which defendant finally assented to do. Miller then requested him to sign an agreement creating and accepting the agency, and also a printed order for one hay-fork, which was attached at the bottom. He also requested defendant to execute a duplicate of the agreement and order, which he did; and Miller took one and defendant kept the other. It was understood that defendant was not to pay for any forks until he had actually sold them. This was all that passed between them. About seven months afterwards defendant was notified by the plaintiff to pay a promissory note purporting to be made by defendant February 1, 1871, for \$270, payable to Alfred E. Miller or bearer, seven months after date, and transferred to plaintiff before maturity. Defendant, although conceding that the signature looked like his, denied that he ever made the note, and the plaintiff brought a suit upon it. On the trial judge BARNARD charged the jury that if they concluded that when Rose signed the orders, he did not intend to execute a note, as the transaction never called for one, it was not a note, and was never, at any time, valid in the hands of any party. The plaintiff appealed to the general term, where the judgment rendered against him was affirmed (*See 44 How. Pr. R.*, 364). From the judgment of affirmance at general term the plaintiff appealed to this court.

*W. Vanamee & Charles H. Winfield*, for plaintiff, appellant.

*W. J. Groo*, for defendant, respondent.

JOHNSON, *J.*—The judge charged the jury that if the paper sued upon was never delivered as a note, the plaintiff must fail in the action, and that even if it was delivered and the plaintiff neglected to make proper inquiry as to its origin, he was not a *bona fide* holder and could not recover.

The exception to the charge was general, but if both propositions were erroneous the error can be reached and cor-

---

Chapman agt. Rose.

---

rected, especially as the attention of the judge appears to have been called by request, to charge to the precise grounds on which the charge is now claimed to be erroneous. The latter branch of the charge presents the question of notice to put a party on inquiry, as affecting his right to be regarded as a *bona fide* holder. It is now however, the settled law, that mere negligence, however gross is not sufficient to deprive a party of the character of a *bona fide* holder. There must be proof of bad faith. That alone will deprive him of that character (*Welch* agt. *Sage*, 47 *N. Y.*, 143; *Seybel* agt. *National Currency Bank*, *comm. of appeals* 1873, *MS.*; *Murray* agt. *Lardner*, 2 *Wallace*, 110; *Goodman* agt. *Simonds*, 20 *Howard*, 452). This part of the charge, therefore, cannot be sustained. If then, the appellant can maintain the position that the other branch of the charge is also erroneous, he will be entitled to a reversal of the judgment notwithstanding the generality of the exception.

The evidence tended very strongly to show that the signature of the defendant to the note sued upon, was obtained from him through a very gross and fraudulent imposition perpetrated upon him by one Miller. That when he signed it he supposed he was signing a paper of a very different character, and not an engagement to pay money absolutely. He had just before signed an order for the delivery to himself of a hay-fork and two grappling pulleys, amounting together in price to nine dollars, for which he engaged to pay, and this paper now in suit was presented to him as a duplicate of that order, and was signed as such without examination or reading it, upon the statement of Miller, with whom he was dealing, that such was its character. There does not appear to have been any physical obstacle to the defendant's reading the paper before he signed it. He understood that he was signing a paper by which he was about to incur an obligation of some sort, and he abstained from reading it. He had the power to know with certainty the exact obligation he was assuming, and chose to trust the integrity of the person with

---

Chapman agt. Rose.

---

whom he was dealing, instead of exercising his own power to protect himself. It turns out that he signed a promissory note, and that it is now in the hands of a holder in good faith for value. The question which arises on the branch of the charge now under consideration is, whether it is enough as against a *bona fide* holder, to show that he did not know or suppose that he was signing a note, unless it also appears that he was guilty of no laches or negligence in signing the instrument. To that inquiry the attention of the judge at the trial was distinctly called, and the instruction which he gave and which was excepted to did not submit, but excluded the consideration of it from the jury. It is quite plain that if the law is that no such inquiry is admissible, a serious blow will have fallen upon the negotiability of paper; it will be a premium offered to negligence. To insure irresponsibility, only the utmost carelessness coupled with a little friendly fraud, will be essential. Paper in abundance will be found afloat, the makers of which will have had no idea they were signing notes, and will have trusted readily to the assurance of whoever procured it that it created no obligation. To avoid such evils it is necessary at least, to hold firmly to the doctrine that he who by his carelessness or undue confidence, has enabled another to obtain the money of an innocent person shall answer the loss. If it be objected that there must be a duty of care in order to found an allegation of negligence upon the neglect of it, it must be answered that every man is bound to know that he may be deceived in respect to the contents of a paper which he signs without reading. When he signs an obligation without ascertaining its character and extent, which he has the means to do, upon the representation of another, he puts confidence in that person, and if injury ensues to an innocent third person by reason of that confidence, his act is the means of the injury and he ought to answer to it.

In *Foster agt. McKennon* (L. R., 4, C. P., 704), the action was upon an indorsement of a bill of exchange, and the evi-



---

Chapman agt. Rose.

---

dence was that the defendant indorsed it believing it to be a guarantee, that being represented to him as its nature by a person in whom he put confidence.

The judge charged the jury that if the defendant signed it not knowing it to be a bill, and believing it to be a guarantee in consequence of a fraudulent representation as to its character, and if he was not guilty of any negligence or laches in signing it, he was not bound. The jury found for the defendant. Upon a review of the decision, and after a very full and able discussion of the questions involved, the court held the direction at the trial to have been right. But a new trial was granted upon the ground that they were not satisfied with the finding of the jury on the question of fact, as I understand it, in respect to the question of negligence.

In *Whitney agt. Snyder* (2 *Lansing*, 477), evidence had been refused, that the defendant was unable to read and that the note which he had in fact signed, was represented to him to be an instrument of a different character and was signed by him under such a belief. The court held that the evidence ought to have been received principally upon the grounds and authority of the case last cited, approving both branches of the rule as stated in that case, and adding that the case then in judgment was stronger for the defendant on the question of negligence, than was *Foster agt. McKennon*. This was clearly so, for in *Whitney agt. Snyder*, it appeared that the defendant could not read, and he was therefore compelled to put confidence in some one as to the contents of any paper which he might be called upon to sign. Indeed, the same exception in respect to negligence, is recognized as a necessary element in the decision at general term in this case. The difficulty is that at the trial the judge rejected that qualification of the rule, and held that if the party did not intend to make a promissory note he could not be held bound even in favor of a *bona fide* holder for value. The principle involved is recognized, and in substance decided in *Putnam agt. Sullivan* (3 *Mass.*, 45). In that case the defendants had left with

---

Chapman agt. Rose.

---

a clerk some signatures on blank pieces of paper intended to be used as notes or indorsements, according to specific instructions. The clerk was induced by fraud to part with one of these blank signatures, and it was filled up as a note, leaving the signature to appear as that of a payee and indorsee. The action was by a holder in good faith, and the court giving judgment by C. J. PARSONS, said: The counsel make a distinction between the cases where the indorser through fraudulent pretenses has been induced to indorse the note he is called upon to pay, and where he never intended to indorse a note of that description, but a different note and for a different purpose. Perhaps there may be cases in which this distinction ought to prevail; as if a Chinaman had a note falsely and fraudulently read to him, and he indorsed it supposing it to be the note read to him. But we are satisfied that an indorser cannot avail himself of this distinction, but in cases where he is not chargeable with any laches or neglect, or misplaced confidence in others. Here one of two innocent parties must suffer. The loss has been occasioned by the misplaced confidence of the indorsers in a clerk too young or too inexperienced to guard against the act of the promisors. Upon those grounds the indorsers were held liable.

In *Douglas agt. Malting* (29 Iowa 498), the judge says: "It is better that the defendant and others who so carelessly affix their names to papers, the contents of which are unknown to them, should suffer from the fraud their recklessness invites, than that the character of commercial paper should be impaired, and the business of the country thus interfered with and unsettled."

In all these cases the real ground of decision is not that the party meant to make a promissory note, but that meaning to make an obligation in writing; and which was put in writing that it might of itself import both the fact and the form, and the measure of the obligation, he trusted another to fix that form and measure without exercising that supervision which was in his power, and by which perfect protection was pos-

---

Chapman agt. Rose.

---

sible. In such cases the rule is, that he is bound by the act of him who has been trusted, in favor of a holder in good faith.

The judgment must be reversed and a new trial granted, costs to abide the event.

JOHNSON, J., reads for reversal and new trial. All concur.



---

MacKellar agt. Sigler.

---

### N. Y. COMMON PLEAS.

WILLIAM MACKELLAR, plaintiff and respondent, agt.  
SYLVESTER SIGLER, defendant and appellant.

*Landlord and tenant — monthly rent — abandonment within the year.*

Where a *tenant* hires a house for a year from the first day of May, and is to pay the rent monthly in advance, and on the first day of February he abandons the premises for the alleged cause that they are untenable, and gives up the keys to the landlord, he is liable in any event for the rent of the month of February.

The landlord, in the latter part of March, having, by his previous acts, accepted possession, relet the premises to another tenant for thirteen months, claiming that for the month of April he relet on the tenant's account. *Held*, that there being no agreement in the lease giving the landlord authority to relet the premises on the tenant's account, he could not do so.

Where the landlord, by his acts in making repairs, &c., takes possession of the premises after they have been abandoned by the tenant, he rescinds the agreement and terminates the relation of landlord and tenant, and thereby discharges the tenant from all liability to pay rent thereafter.

*General Term, January, 1874.*

*Before DALY, Ch. J., ROBINSON and LOEW, JJ.*

APPEAL from a judgment of the ninth district court.

This action was brought to recover the sum of seventy-five dollars for two months' rent of a house in 117th street, in the city of New York.

The letting was for one year from the 1st day of May, 1869, to the 1st day of May, 1870, at the yearly rent of \$450.

On the 1st day of February, 1870, the tenant abandoned the premises on the ground that they had become untenant-

---

MacKellar agt. Sigler.

---

able by reason of an overflow of water from the adjoining house ; and at the same time he sent the keys to the plaintiff's residence.

On the trial it appeared that in the latter part of March the plaintiff rented the house to another party for the term of thirteen months, commencing on the 1st day of April, 1870, and ending on the 1st day of May, 1871. The renting for the month of April the plaintiff claimed he did on account of the defendant.

The new tenant went into possession on the 1st day of April, 1870.

The justice rendered judgment in favor of the plaintiff for the amount claimed by him, and the defendant appealed to this court.

*Alfred McIntire*, for defendant, appellant.

*Irving C. Smith*, for plaintiff, respondent.

LOEW, J.—As there is nothing in the evidence to show that, in the agreement for the letting and hire of the premises in question, the landlord reserved the right to relet them, on the tenant's account, in case they became vacant during the term ; and as he did not even notify the tenant of his intention so to do, it is quite plain that when he let the house to another person, it could not have been on behalf of the defendant, and that the tenancy became thereby determined, and the defendant from thenceforth discharged from his obligations as tenant (*Walls* agt. *Atcheson*, 3 *Bing.*, 462 ; *Murray* agt. *Shave*, 2 *Duer*, 183 ; *Hegeman* agt. *McArthur*, 1 *E. D. Smith*, 147).

But this act of the plaintiff did not release the defendant from liability for any rent which may have previously accrued and become due. And as, by the terms of the agreement, the rent reserved was to be paid monthly in advance, the question arises whether or not the plaintiff can recover for the months of February and March.

---

MacKellar agt. Sigler.

---

So far as the rent for the month of February is concerned, I think he can. This, according to the contract, became due on the first day of that month; and although some of the acts hereinafter mentioned occurred before the expiration of said month, still, as the rent had previous thereto become due and payable, they constituted no defense to plaintiff's right of action therefor (*Giles* agt. *Comstock*, 4 *N. Y.*, 270).

But I entertain no doubt that they were sufficient in law to bar his claim for rent for the month of March.

From the evidence returned to us it seems that the plaintiff not only retained the key of the premises, but he testified that he "went into the house to see what condition it was in and to make repairs." It further appears, from his own testimony, that he entered the house within a day or two after the tenant had abandoned it; that he had a carpenter at work there three days in February, and again in the latter part of March; and also that he put in a new mantel, and had the walls in the house papered.

Now, although the plaintiff refused to accept the surrender of the premises which the defendant offered to make, just prior to the time when the latter vacated them, yet these subsequent acts, on the part of the plaintiff, were so entirely inconsistent with the relation of landlord and tenant, which had subsisted between them, as to preclude the idea of a continuance thereof.

In the absence of a stipulation to that effect, in the agreement creating the tenancy, the landlord has no right, except, perhaps, where it may be requisite to prevent waste, to enter the demised premises during the term, without the consent of his tenant, to make repairs; and if he does, he will be deemed a trespasser, and become liable as such (*Barker* agt. *Barker*, 3 *C. & P.*, 558; and see *Shannon* agt. *Burr*, 1 *Hilt.*, 39).

As the plaintiff would unquestionably have been a trespasser if he had done the acts in question against the will of the defendant, it seems plain that they are, under the circum-



---

MacKellar agt. Sigler.

---

stances of this case, equivalent to an agreement on his part to resume possession, and amount to a surrender by operation of law.

It is clear to my mind, therefore, that by, in effect, taking possession of the premises, after they had been abandoned by the defendant, and making the repairs and alterations referred to, the plaintiff rescinded the agreement and terminated the relation of landlord and tenant, and thereby discharged the defendant from all liability to pay rent for the month of March.

The judgment of the justice should be reduced to thirty-seven dollars and fifty cents, being the rent for the month of February, and affirmed for that sum, with costs of the court below, and reversed as to the residue, without costs of appeal to either party.

DALY, Ch. J., and ROBINSON, J., concurred.

Youmans agt. Board of Supervisors of Delaware Co.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK, on the relation  
of WILLIAM YOUMANS, Jr., agt. THE BOARD OF SUPER-  
VISORS OF DELAWARE COUNTY.

*Assessment and taxation of rents in leases in fee — power of supervisors.*

Where the assessors of a town or towns, under and in pursuance of the provisions of the Laws of 1846 (*Laws of 1846, p. 466*), assess the amount of rents reserved in any leases in fee, chargeable upon lands within such towns payable in money, which rents shall be assessed to the person entitled to receive the same as personal estate for the purpose of taxation, at a principal sum, the interest of which at the legal rate per annum shall produce a sum equal to such annual rents, precisely as they are required to assess them by said act, the board of supervisors of the county have no power or authority to change or correct, in any manner, such assessments, although the owner of the rents was a non-resident of either town.

Held, that the relator having been assessed, as he should have been, according to the act of 1846, the assessors could not have lawfully reduced his assessments if he had been a resident of their town, and had appeared before them on the day they reviewed their assessments, although the assessments against him were unjust, by reason of the fact that the assessors, as shown by his petition and affidavits, had assessed all other personal property, and also all real property in their respective towns, at sums not exceeding one-third of the true value thereof.

The statute in relation to the assessment of real and personal property considered and discussed, and the general mode of assessment condemned. There being no doubt that there is scarcely a town or ward in the state where the assessors do not violate their oaths by assessing the taxable property in their towns or wards, at sums much less than its true value, at about one-third or one-quarter of its true value; while the owner of rents reserved in leases in fee is compelled to pay the full value of such rents, without any remedy.

*Tompkins Special Term, commencing December 23, 1873.*

*Present—RANSOM BALCOM, Justice.*

---

Youmans agt. Board of Supervisors of Delaware Co.

---

ORDER that defendants show cause why a peremptory mandamus should not issue against them commanding them to consider and act upon the relator's petition asking them to reduce the assessments of rents reserved to him in leases in fee on lands in the towns of Kortright and Davenport, in such a manner and to such an extent as to render such assessments against him just and equitable, and to exercise their discretion in respect to such assessments, &c.

The defendants received and acted on the relator's petition, and refused to change or interfere with said assessments upon the ground that they had no legal power or discretion in the matter, it being the opinion of a majority of them, from the facts before them, that said assessments were made according to the statute; said rents being reserved in money, and there being no conflict in the evidence before them as to the basis upon which the assessments in said towns were made.

The relator was not a resident of the town of Kortright or Davenport, but was a resident of the town of Delhi, at the time said assessments were made, and he still is a resident of the latter town.

*D. D. Niles*, for relator, and *relator* in person.

*William H. Johnson*, for defendants.

BALCOM, *J.*—Section 1 of chapter 327 of the Laws of 1846 (*Laws of 1846*, p. 466), declares that, "It shall be the duty of the assessors of each town and ward, while engaged in ascertaining the taxable property therein, by diligent inquiry to ascertain the amount of rents reserved in any leases in fee, or for one or more lives, or for a term of years exceeding twenty-one years, and chargeable upon lands within such town or ward, which rents shall be assessed to the person or persons entitled to receive the same, as personal estate, which it is hereby declared to be, for the purpose of taxation under this act, at a *principal sum*, the interest of which at the legal



---

Youmans agt. Board of Supervisors of Delaware Co.

---

*rate per annum shall produce a sum equal to such annual rents; and in case such rents are payable in any other thing except money, the value of such annual rents in money shall be ascertained by the assessors, and the same shall be assessed in manner aforesaid."*

According to the resolution adopted by the defendants, and the papers presented to me by their counsel, the assessors of the towns of Kortright and Davenport assessed the rents reserved to the relator in leases in fee on lands in those towns precisely as they were required to assess them by the aforesaid section of the law of 1846. They assessed the relator \$100, for each sum of \$7, rent reserved to him in every lease in fee he owned. But in the relator's petition and affidavit presented to the defendants, and in his affidavit since made and now before me, he swears that he was assessed in Kortright and Davenport the sum of \$16.67 for each and every 150 acres of land in those towns covered by one of his leases in fee. I know from the amount of litigation heretofore had before me touching such lands and leases, that he has inadvertently made a mistake as to the amount of the assessments of rents against him in those towns. The amount of rent reserved in each lease of 150 acres of land, is \$16.67. If the relator had been assessed only \$16.67 for the rent reserved in each lease of 150 acres of land, he surely would not complain. But the truth is he has been assessed a sum for each lease of 150 acres of land, which sum if lent upon interest at seven per cent per annum, the interest for one year would amount to \$16.67; and that is the way the law of 1846 required the assessors to assess him.

The relator having been assessed, as he should have been, according to the law of 1846, the assessors could not have lawfully reduced his assessments, if he had been a resident of their town and had appeared before them on the day they reviewed their assessments; although the assessments against him were unjust by reason of the fact that the assessors, as shown by his petition and affidavits, had assessed all other

---

Youmans agt. Board of Supervisors of Delaware Co.

---

personal property and also all real property in their town at sums not exceeding one-third of the true value thereof.

The law as to assessing property other than rents reserved in leases in fee, or for one or more lives, or for a term of years exceeding twenty-one years (which is provided for in the law of 1846), is that "All real and personal estate liable to taxation, shall be estimated and assessed by the assessors *at its full and true value*, as they would appraise the same in payment of a just debt due from a solvent debtor (1 *R. S.*, 5th ed., 911). That rule should be followed by the assessors in all assessments except where the assessors are specially required by law to observe a different rule (*Id.*). And they are specially required to observe the rule, respecting the assessment of rents reserved in the above mentioned leases, prescribed by the law of 1846 (*Laws of 1846*, p. 466). Assessors are required to make and subscribe an oath annexed to their assessment roll, in which oath they shall state, among other things, "that with the exception of those cases in which the value of the said real estate has been changed by reason of proof produced before us, we have estimated the value of the said real estate at the sums which a majority of the assessors have decided to be *the full and true value thereof*, and at which *they would appraise the same in payment of a just debt due from a solvent debtor* ; also that the said assessment roll contains a true statement of the aggregate amount of the taxable personal estate of each and every person named in such roll, over and above the amount of debts due from such persons respectively, and excluding such stocks as are otherwise taxable, and such other property as is exempt by law from taxation, *at the full and true value thereof*, according to our best judgment and belief" (1 *R. S.*, 5th ed., p. 913).

The ground of the relator's grievance is not that he has been unlawfully assessed, but that the assessors violated their oaths (according to his showing), in assessing all the taxable property of other persons in the towns of Kortright and

---

Youmans agt. Board of Supervisors of Delaware Co.

---

Davenport, so far as they have assessed it at all, at less than *one-third of its true value*. I do not doubt that they have done so, or that, by pursuing that course, the relator is compelled to pay *two-thirds* more than his just proportion of the taxes he ought to pay in each of those towns; that is to say, he is obliged to pay three dollars taxes when he ought not to be required to pay a tax exceeding one dollar; because other tax-payers of those towns are not assessed sums exceeding *one-third* of the true value of their taxable property. This is truly grievous so far as the relator is concerned, and shameful as well as criminal on the part of the assessors. And this state of things exists in those towns notwithstanding the law is that every assessor who shall willfully swear false in taking and subscribing the oath to their assessment roll, "shall be deemed guilty of and liable to the penalties of willful and corrupt perjury" (1 *R. S.*, 5th ed., 913). And I do not doubt that there is scarcely a town or ward in the state where the assessors do not violate their oaths by assessing the taxable property in their towns or wards at sums much less than its true value. I am told that assessors quiet their consciences by reason of the common custom of all assessors to assess property at about one-third or one-quarter of its true value. I admit such a custom produces no injustice where all are assessed in proportion, at sums less than the law requires; but where one tax-payer's property is assessed (as the relator's has been), at its full and true value, when that of others is assessed at only one-quarter or one-third of its true value, very shameful injustice is done to such one tax-payer; and he is, practically, without any remedy, for no grand jury has been found to indict assessors for swearing they have assessed their property at its full and true value when they have assessed it at only from one-quarter to one-third of its actual value. They do not condemn the officers who have lessened their taxes by low assessments.

The only effectual way I can think of to provide a remedy



---

Youmans agt. Board of Supervisors of Delaware Co.

---

for persons lawfully assessed, as the relator is, for the full value of their property, when the property of other tax-payers is assessed at only one-third or one-quarter of its true value, is for the legislature to pass a law giving to such aggrieved tax-payers a right of personal action against the assessors, for the recovery of double or treble the amount of tax they are compelled to pay by reason of the disproportionate assessments.—*i. e.*, assessments of others' property below the values the law requires that they should fix such values. And that remedy might be worse than such grievances.

By the act of 1858 (*Laws of 1858, chap. 357, p. 600*), it is provided respecting rents reserved in leases in fee, that "Whenever assessments are made against any person in any town or ward *in which he does not reside*, the board of supervisors of the county to which such assessments are returned, shall have in all respects as full power and authority, and it shall be their duty to *correct* such assessments as to the valuation of the rents, and as to the gross amount for which such person shall be assessed, *as the assessors have as to residents of a town.*"

It is plain that assessors of a town could not legally "correct" the assessment of any such rents against a resident of their town by reducing such assessment below the sum which the law of 1846 requires the assessors to fix upon it and assess it at; for the reason that when such rents are assessed as required by that law, there is no error for the assessors to correct on the day they review their assessments.

It is true that the act of 1858 further provides, that "such board of supervisors may reduce the amount of such assessments (meaning assessments of rents reserved in leases in fee, for lives or for years), in the respective towns or wards of the county *in proportion or otherwise, as the nature of the corrections require, to make such assessments just*" (*Laws of 1858, p. 600*). But this act provides for relief by the board of supervisors to only non-residents of the towns

---

Youmans agt. Board of Supervisors of Delaware Co.

---

in which they are assessed for the rents mentioned in such act. And it is not to be presumed that the legislature intended to authorize the board of supervisors to reduce the assessments of such rents against *non-residents* lower than the assessors of towns can lawfully reduce them against *residents* when they review their assessments. Some of such rents, in one or more counties, are payable in grain, or other property, the value of which, in money, the assessors are to ascertain and assess in the manner they assess such rents when payable in money (*Laws of 1846, p. 466, § 1*). On the day assessors review their assessments, it is their duty to correct any error they have made in assessing rents reserved in leases in fee, or for lives or years, so such assessments will be in conformity with the law of 1846; but they cannot, legally, make any other change in such assessments. And when such rents are assessed against *non-residents* of a town in which they are made, all that the board of supervisors can do is to correct such assessments as to the valuation of the rents and as to the gross amount for which the non-residents have been assessed for such rents; and reduce the amount of such assessments, in proportion or otherwise, as the nature of the corrections require, to make such assessments just (*Laws of 1858, p. 600*). And I think what is here meant, "to make such assessments just," is, to correct or reduce them so they will be as the assessors are required to make them by the law of 1846. Any other construction of the act of 1858 would give non-resident owners of such rents a remedy for unjust, or erroneous, or disproportionate assessments of such rents, before the board of supervisors, not given to resident owners of such rents before the assessors of their town, on the day such assessors meet to review their assessments.

It seems to me that, when the defendants examined the assessment rolls of the towns of Kortright and Davenport, and ascertained that the rents chargeable upon lands within those towns reserved to the relator in leases in fee, or for life

---

Youmans agt. Board of Supervisors of Delaware Co.

---

or years, were assessed as required by the law of 1846, and that the assessors had correctly specified in the assessment rolls each rent so assessed, and had fixed the correct value upon articles, other than money, in which any of such rents were payable, if there had been any so payable, they had done all the act of 1858 (*Laws of 1858, p. 600*) required them to do, and all that the relator could legally or equitably call upon them to do under that act.

I admit that the relator has suffered a grievous wrong by the way the assessors of the towns of Kortright and Davenport assessed the taxable property of residents of those towns; but it is a wrong which, in my judgment, could not be remedied by the defendants, and for which the relator has no remedy by mandamus. I think that some way must be found out to make assessors assess taxable property, other than rents, at its true value, or the relator must find relief against disproportionate assessments and future wrongs in an amendment by the legislature of the law of 1846 and the act of 1858.

For these reasons I am of the opinion that the relator's motion for a peremptory mandamus against the defendants should be denied. But for the hardship of the case as against the relator, no costs of the motion should be allowed.



---

World Mutual Life Ins. Co. agt. Bund "Hand in Hand," &c.

---

### N. Y. SUPERIOR COURT.

THE WORLD MUTUAL LIFE INSURANCE COMPANY, plaintiff,  
agt. THE BUND "HAND IN HAND," ALBERT ELSASSER,  
FERDINAND SEIDEL and THE NEW YORK LIFE INSURANCE  
Co., defendants.

#### *Breach of contract — injunction.*

The plaintiff, a mutual life insurance company, entered into a contract with the defendant, a club incorporation, by which the plaintiff agreed to insure the lives of all the members of the defendant, who should be accepted by the plaintiff at the rate of the regular premiums established, or to be established by the plaintiff; to accept through the instrumentality of the defendant payment of the said premiums in weekly, monthly or quarterly installments; and to grant to the defendant certain commissions and allowances for procuring the business and actively assisting in its management, containing minute provisions as to the rights and duties of the contracting parties, and of the holders of the policies to be issued under it. It was also agreed that as long as the defendant did not number 20,000 paying members, and a single policy remained in force, the contract should not be dissolved.

Under this contract the defendant effected insurance on the lives of about 1,500 of its members, so that defendant became a highly important branch of plaintiff's business. This result was obtained by the plaintiff at great cost and labor, by extending at all times liberal aid to the defendant, and by making liberal advances to the agents of the defendant to be repaid from future business.

For certain reasons the relations between these corporations became highly unpleasant, and the defendant has taken steps to transfer its insurance business to another life insurance company.

This action was brought by the plaintiff, and an injunction granted restraining the unlawful action of the defendant in violating the contract, but not to affect the business or property of the defendant generally.

*Held*, on this motion, that the court had searched in and outside of the contract by which the rights of the parties are to be determined, for some justification of or legal excuse for the conduct of the defendant,

---

World Mutual Life Ins. Co. agt. Bund "Hand in Hand," &c.

---

but had not been able to discover any. Upon this point the burden of proof rests with the defendant.

*Held*, also, that upon well-settled principles of equity jurisprudence the plaintiff has shown itself entitled to the continuance of the injunction, until the final determination of the rights of the parties upon the trial.

*At Special Term, December, 1873.*

MOTION for continuance of injunction.

*Prentice & Mather*, for the motion.

*James D. Reymert, and Fullerton, Knox & Crosby*, opposed.

FREEDMAN, J.—The defendant, "Bund Hand in Hand," is a corporation incorporated under and in pursuance of an act entitled, "An act for the incorporation of societies or clubs for certain social and recreative purposes," passed April 11th, 1865. Its object is to provide relief to sick and poor members, and to effect insurance on the lives of all members in a legally incorporated life insurance company. To carry out this object the said "Bund Hand in Hand," on or about the 4th of April, 1872, entered into a contract with the plaintiff, whereby the latter agreed to insure the lives of all the members of the Bund, who should be accepted by the plaintiff, at the rate of the regular premium established or to be established by the plaintiff; to accept, through the instrumentality of the Bund, payment of the said premiums in weekly, monthly or quarterly installments; and to grant to the Bund certain commissions and allowances for procuring the business and actively assisting in its management. The contract contains minute provisions as to the rights and duties of the contracting parties, and of the holders of the policies to be issued under it. They are too numerous to be noticed in detail. The plaintiff agreed, among other things, not to allow, within the territorial limits of the states, New York, New Jersey and Connecticut, the same terms to any other organization that might enter into competition with the Bund.

---

World Mutual Life Ins. Co. agt. Bund "Hand in Hand," &c.

---

The latter bound itself not to insure its members in any other than plaintiff's company. It was also mutually agreed that as long as the Bund did not number 20,000 paying members and a single policy remained in force, the contract should never be dissolved.

By the terms of the constitution of the Bund, the commissions to be allowed by the plaintiff were to pass into the treasury of the Bund and to constitute a fund, from which members in certain cases should derive certain benefits; and the contract with the plaintiff was regarded as offering such great inducements to members, that the fact of its execution was incorporated into the constitution of the Bund and announced to the world in the following language:

"The Bund has made a contract with the World Mutual Life Insurance Company, an old, legally incorporated life insurance company, well known to the public for its solidity, wherein are secured to the society:

- a., a lower rate;
- b., the agent's commission;
- c., the necessary printing; and
- d., an allowance for management, increasing with the increase of membership."

Under this contract the Bund Hand in Hand effected insurance on the lives of about 1,500 of its members, so that said society became a highly important branch of plaintiff's business. This result was obtained by the plaintiff at great cost and labor, by extending at all times liberal aid to the Bund, and by making liberal advances to the agents of the Bund to be repaid from future earnings.

For reasons not necessary to discuss, the relations between these two corporations have become highly unpleasant, and the Bund has taken some steps to transfer its insurance business to the New York Life Insurance Company. It is true that no contract to this effect has yet been executed. But the evidence is clear and convincing that the execution of one is contemplated, and that negotiations for that purpose were



---

World Mutual Life Ins. Co. agt. Bund "Hand in Hand," &c.

---

had. The evidence also shows that an agitation has been set on foot by some of the officers of the Bund to induce the members of that corporation to suffer their policies in plaintiff's company to lapse, and then to effect a new insurance in the New York Life Insurance Company.

I have searched in and outside of the contract by which the rights of the parties are to be determined, for some justification of, or legal excuse for such conduct, but have not been able to discover any. Upon this point the burden of proof rests with the Bund. The circumstances relied on as constituting breaches of the contract on the part of the World Mutual Life Insurance Company, namely, delay in passing upon applications for insurance, the rejection of certain applicants, &c., &c., seem to be matters which under the contract rested wholly in the discretion of that company. They might have been, and if they constituted real grievances, they should have been submitted to the board of conference provided for in the contract; but the Bund did not see fit to resort to this remedy. Nor can the World Mutual Life Insurance Company be tried in *this* action upon charges of insolvency and reckless management of its own corporate affairs. If true, these charges should be made and submitted to the authorities charged by law with the duty of investigating them and taking suitable action thereon. Before they are thus established, the Bund is not in a position to urge simply the precarious condition of the said company as matter of defense, because it might readily have provided in the contract itself for such a contingency, or for the right of terminating the contract for certain causes upon certain conditions. Instead of doing so, it seems to have been the clear intent and deliberate purpose of the Bund that its fortunes should be indissolubly connected with the fortunes of the World Mutual Life Insurance Company. In view of this fact I have no power to make a new or different contract for the parties.

Now it may well be, that many members of the Bund are

---

World Mutual Life Ins. Co. agt. Bund "Hand in Hand," &c.

---

desirous of severing their relations with the plaintiff; and if in the exercise of their own individual judgment they should see fit to suffer their policies to lapse and to take out new ones in the New York Life Insurance Company, neither the plaintiff nor the Bund can complain. But neither the Bund, nor any of its officers, has the right to influence them, directly or indirectly, in this respect. All corporate action to this end is unlawful. Nor can any person while holding an official position in the Bund, be permitted, under the plea of individual action, to produce this result or to reap any advantage or benefit from such action. Even if sufficient causes existed for which a court of equity could grant a dissolution of the contract, yet, as long as the ability on the part of the plaintiff to fulfill its part of the contract continues, such dissolution, in view of the fact that there are unadjusted accounts between the parties and a balance due to the plaintiff, could be decreed only after an accounting and upon restitution. He who seeks equity must do equity. So if at any time plaintiff should for any reason become incapacitated from performing its duties under the contract, the Bund may have relief on a proper application for that purpose, and upon such terms as may be just. But no such relief is prayed for in the answer. The Bund and the defendants, Elsasser and Seidel, who are officers thereof, simply deny the breach of contract alleged against them, and then they aver a breach on plaintiff's part for which they claim damages. Their position in this respect, as the case now stands, is not a tenable one.

The injunction, as modified, does not affect the business or the property of the Bund generally, but restrains only the unlawful action above referred to. Upon well-settled principles of equity jurisprudence the plaintiff has shown itself entitled to its continuance until the final determination of the rights of the parties upon the trial, and the motion must, therefore, be granted, and the injunction continued, with ten dollars costs.

---

Matter of May & Berwin.

---

## UNITED STATES DISTRICT COURT.

IN THE MATTER OF AUGUST MAY &amp; AARON BERWIN, Bankrupts.

*In bankruptcy.*

A claim for rent which accrued after the filing of the petition in bankruptcy, under a lease executed prior to such filing, is not provable in bankruptcy.

*Southern District of New York.*

*At Chambers, 4 Warren street, in the city of New York, in said district, on the 10th day of March, A. D. 1874.*

I, the undersigned register in charge of the above entitled matter do hereby certify : That the firm of T. H. & T. W. Conkling have proved a claim before me against the said estate of \$1,101 $\frac{64}{100}$  for rent of premises, leased by them to the bankrupts from the 1st day of May, 1871, to the 1st day of May, 1873, at a rental of \$3,500, payable monthly on the first day of each and every month, beginning with the first day of June, 1871, claiming the sum aforesaid as and for the rent due under the said lease from January 1st, 1873, to May first of the same year, after crediting the sum of sixty-five dollars paid them by the assignee for the use of said premises after the bankruptcy.

The petition in bankruptcy was filed on the 28th day of December, 1872, the rent of said premises having been paid up to the 1st of January, 1873.

The assignee objects to the proof on the ground :

1. That after the bankruptcy he surrendered the premises to the landlords by delivering the keys to their agents.
2. That he hired the premises from the agent of the land-



---

Matter of May & Berwin.

---

lords during the month of January, 1873, at a stipulated price of five dollars a day, and paid for the days he used and occupied the same the sum of sixty-five dollars.

3. The assignee claims that the claim is not of the character specified in section 19, and cannot, therefore, under the last clause of that section, be allowed against the estate. That the language of the seventh clause of section 19, providing that "where the bankrupt is liable to pay rent, which rent falls due at fixed or stated periods, the creditor may prove for a proportional part thereof, *up to the time of the bankruptcy*," followed by the words in the last clause of the section—"no debt other than those above specified, shall be proved or allowed against the estate," in effect forbids the proving of a claim for rent which accrued subsequently to the bankruptcy.

Touching the first two objections made on the part of the assignee, I think the provisions of the re-entry clause of the lease obviate any force that might otherwise be claimed for them.

As to the third objection, I think the construction of the act claimed by the assignee cannot prevail.

1. It would be unjust. There can be no doubt of the personal liability of the tenant for such rent. No good reason can be assigned for cutting the creditor off from his dividend upon such a claim. It is in no way necessary to the full and fair operation of the act to do so.

Again, to give the act this construction as to rent would necessitate the giving it the same construction in reference to all "other debts" which "fall due at fixed and stated periods." The act couples them together so that it would be impossible to apply a rule to the case of rent, which would not equally apply to all other debts that fall due, as a large class of debts do fall due, at fixed and stated periods.

The closing words of the clause in question seem to indicate a mere purpose to provide a convenient method of proving claims, rather than to prohibit the proving of such claims.

---

Matter of May & Berwin.

---

The twenty-third section of the English bankruptcy law, providing for the disclaiming of tenures burdened with onerous covenants, provides that "the person injured by the operation of that section may prove the amount of such injury as a debt against the estate of the bankrupt." Our act has no such provision, and the assignee would not probably be at liberty to give proof in diminution of the damages which the landlords claim by the terms of this lease. It seems to be contemplated that the measure of damages is the rent reserved in the lease, less such sum as they may have received from a subsequent letting, or from the use and occupation thereof by themselves. It clearly enough appears from the testimony, herewith handed up, that the landlords were unable to obtain a larger sum than that credited (\$65), for the use of the premises during the four months in question, and that they did not personally occupy the same. I am, therefore, of the opinion that the claim should be allowed.

The said assignee objecting to the decision aforesaid, and the parties accepting the issue as above stated, desire said issue to be certified to the court for decision.

I have, therefore, certified the foregoing with the testimony and exhibits taken by me bearing on said issue and proof of claim on file. The parties desire to be heard by counsel before the district judge.

Respectfully submitted.

I. T. WILLIAMS,  
*Register in Bankruptcy.*

*Brewster & Crowell*, for the landlords.

*The Assignee*, in person.

BLATCHFORD, J.—T. H. & T. W. Conkling have proved a claim against the bankrupts for \$1,101.64, and interest from May 1st, 1873, "being a balance for rent of premises" let to the bankrupts by T. H. & T. W. Conkling, by a lease bear-

---

Matter of May & Berwin.

---

ing date February 17th, 1871, and expiring May 1st, 1873. The rent claimed in the proof is for the four months from January 1st, 1873, to May 1st, 1873, at the rate of \$291.66 per month, less a credit of sixty-five dollars as paid. The assignee of the bankrupts has filed with the register an objection to such claim and proof of debt, on the ground that the alleged debt or claim is not provable against the said estate under the bankruptcy act, "for the reason that the said debt or claim, or any part thereof, did not exist at the time of the filing of the petition for the adjudication of bankruptcy herein, to wit, the 28th day of December, 1872." The register has taken testimony in the premises, not under an order made by him in pursuance of General Order No. 34, on a petition to him for the re-examination of the claim, but apparently by the consent of the parties.

Thereupon the register has certified to the court, under section 4 of the act, the question or issue, as to whether the claim should be allowed. He also has certified the testimony and the proof of claim. The lease forms a part of the testimony.

The petition in bankruptcy was filed on the 28th of December, 1872. The rent under the lease was fully paid up to the 1st of January, 1873, before the petition in bankruptcy was filed. The rent reserved by the lease was payable monthly, on the first day of each month, at the rate of \$3,500 per year. The lease was for two years from the first of May, 1871. The first rent became payable on the 1st of June, 1871. The rent for the month from January 1st, 1873, to February 1st, 1873, did not become payable till February 1st, 1873. The adjudication of bankruptcy was made before February 1st, 1873.

The nineteenth section of the act provides that all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing but not payable until a future day, a rebate of interest being made where no interest is payable by the terms of contract, may be proved



---

Matter of May & Berwin.

---

against the estate of the bankrupt. \* \* \* Where the bankrupt is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods. If any bankrupt shall be liable for unliquidated damages arising out of any contract or promise, \* \* the court may cause such damages to be assessed in such mode as it may deem best, and the same so assessed may be proved against the estate.

It is contended for the lessors, that this claim for rent was, under the nineteenth section, a debt existing at the time of the adjudication of bankruptcy, but not payable until a future day, and that, therefore, it may, by the terms of that section, be proved against the estate. The case is sought to be likened to that where an article is purchased to be paid for in installments, at fixed periods, and only part of the installments are paid before an adjudication of bankruptcy, in which case, it is contended, the vendor can prove his debt for the remaining installments, a rebate of interest being made if no interest is payable by the terms of the contract. This might be so if there were not a special provision for the case of rent falling due at fixed and stated periods. And there seems to be a reason for such special provision in regard to rent, in the fact that where an article is purchased the consideration is or is assumed to be executed, while in the case of rent, the consideration is assumed to be not executed but executory, the use and occupation being *in futuro*. But, whatever the terms of payment of rent may be, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at the periods fixed by the contract of letting. The provision in regard to rent not yet due, and to proving for a proportionate part of it, with the further provision that no other than the specified debts shall be proved, makes it entirely plain that this debt, as proved, cannot be allowed.

---

Matter of May & Berwin.

---

Whatever is not provable will not be discharged. The provisions in regard to what debts may be proved are arbitrary, but such provisions do not affect the existence or validity of such debts as are not provable, nor does a discharge release them. If the debt is provable it comes in for a dividend, and can unless it is an accepted debt be discharged. If it is not provable, it does not come in for a dividend, but it will not be discharged.

The words "the time of the bankruptcy," mean the time when the petition was filed, to which time the adjudication relates. The rent to that time has been paid. The objection of the assignee to the proof of debt, as made, is sustained and the claim set forth in the proof of debt is disallowed.

---

Norwood agt. Resolute Fire Insurance Co.

---

## N. Y. SUPERIOR COURT.

*Reinsurance — loss adjusted — terms of policy.*

## No. 1.

CARLISLE NORWOOD, Receiver of THE LORILLARD FIRE INSURANCE COMPANY, agt. THE RESOLUTE FIRE INSURANCE COMPANY.

## No. 2.

SAME agt. SAME.

## No. 3.

SAME agt. SAME.

## No. 4.

SAME agt. SAME.

A policy of reinsurance consisting of a printed form filled in in writing contained, immediately after the ordinary reinsuring clause, the following written provision: "Loss, if any, payable *pro rata* with the reassured." In a subsequent portion of the policy, among a number of qualifying printed clauses, occurred the following (also printed): "Reinsurance, in case of loss, to be settled in proportion as the sum reinsured shall bear to the whole sum covered by the reinsured company."

*Held*, that the former clause was too obscure to vary the general allegation of the reinsurer to pay, whether the primitive insurer had paid or not. That as the policy was not framed with the view of giving to each clause a separate meaning, but with a contrary view, the said former clause could not be deprived of its ordinary meaning, merely because other parts of the policy make a similar provision.

That the said former clause means that the loss under the reassuring policy is payable by the reassuring company *pro rata* with the loss payable by the primitive insurer; that is, that the reassurer is bound to indemnify the primitive insurer in the same proportion that the latter is bound to indemnify the primitive assured; and does not imply that the loss, under the reassuring policy, is not payable till the loss *has been paid* under the primitive policy; or that the loss, under the reassuring policy, is to be paid in the same ratio as the loss *is paid* under the primitive policy.



---

Norwood agt. Resolute Fire Insurance Co.

---

That payment by the reinsured is not a condition precedent to recovery against the reinsurer.

*Before* MONELL, CURTIS and SEDGWICK, JJ.

MOTION that exceptions ordered to be heard in first instance at general term be overruled, and that plaintiff have judgments on verdicts rendered in his favor under direction of the court.

These four actions were brought upon policies made by the defendant reinsuring the company, of which the plaintiff was receiver, against loss on certain property, the owners of which property had been insured upon the same property by the receiver's company.

Each of the policies of reinsurance contained, immediately after the description of the property upon which the reinsurance was made, the following written clause: "Loss, if any, payable *pro rata* with the reassured."

The policies also contained the following among the usual printed clauses: "Reinsurance, in case of loss, to be settled in proportion as the sum reinsured shall bear to the whole sum covered by the reinsured company."

The complaints set forth these two clauses in full, and, among the other ordinary allegations, contained the allegation that due notice and proofs of loss were made by the receiver's company and received by the defendant.

The complaint contained no allegation of any payment by the receiver or his company to the primitive assured.

The trials took place on the 22d day of April, 1873, before the Hon. J. J. FREEDMAN and a jury.

All the allegations of the complaint, not admitted by the answer, were admitted upon the trial to be true, or to have been duly established by the proof offered, with the exception of the allegation of notice and proofs of loss. The proof offered under this allegation was of service upon the defendants of a copy of the ordinary proofs and notice which had been served upon the plaintiff's company after the loss under the primi-

---

Norwood agt. Resolute Fire Insurance Co.

---

tive policy, pursuant to the terms of such policy; and of the fact that the defendant had, since the reception of the proofs and notices, offered to pay the plaintiff the same per centage as the plaintiff paid to the primitive insured.

The defendant, after the plaintiff had rested, moved to dismiss the complaints on the ground that no proof had been made of any payment by the receiver or his company to the primitive assured, and that without such payment the defendant was not liable; and on the ground that the preliminary proofs were defective, as not containing any proof of such payment. Such motion was denied, and defendant excepted.

The defendant thereupon requested the judge to direct verdicts for the defendant. Such request was refused, and the defendant excepted.

The defendant then requested the judge to direct verdicts for the defendant on the ground that, by the terms of defendant's policies, some payment must have been made by the reassured before any claim could be made on the reassurers. Such request was refused, and the defendant excepted.

Defendant then requested the judge to direct verdicts for the defendant on the ground that the defendant was only liable for payment *pro rata* with the reassured. Such request was denied, and the defendant excepted.

The defendant putting in no evidence, the judge directed verdicts for the plaintiff, to which direction the defendant excepted.

The verdicts were duly found, upon which the judge directed the exceptions to be heard in the first instance at general term, the judgments meanwhile to be suspended.

The exceptions were heard at the general term on the 16th day of October, 1873, and the following decision, that the exceptions be overruled, and the plaintiff have judgment, was rendered on the 31st day of December, 1873.

---

Norwood agt. Resolute Fire Insurance Co.

---

*Carlisle Norwood, Jr.*, for the plaintiff.

On nature of contract of reinsurance, cites *Hone & Bokes, receivers, &c.*, agt. *The Mutual Safety Ins. Co.* (1 *Sandf. Rep.*, 137, p. 145); *S. C.*, affirmed sub nom.; *The Mutual Safety Ins. Co.* agt. *Hone et al., Receivers of the American Mutual Ins. Co.* (2 *N. Y.*, 235, p. 240); 3 *Kent Comm.* (279); *Park on Ins.* (2d *Am. ed.*, 276); *Phillips on Ins.* (§ 374); *The Eagle Ins. Co.* agt. *The Lafayette Ins. Co.* (9 *Ind.*, 445); *Flanders on Fire Ins.* (30); *Carrington* agt. *The Com. Fire and Marine Ins. Co.* (1 *Bos.*, 52); *Blackstone, receiver*, agt. *Alemannia Fire Ins. Co.* (4 *Daly*, 299); *The Philadelphia Trust, Safe Deposit and Ins. Co.* agt. *The Fame Ins. Co.* (*Penn. Sup. Ct., Opinion by SHARSWOOD, February 8, 1873*); *In Matter of the Republic Ins. Co.* (VIII *Nat. Bankruptcy Register*.)

To the effect that the contract of reinsurance is distinct from primitive contract of insurance, cites 3 *Kent Comm.* (279); *Park on Ins.* (2d *Am. ed.*, 277); *Phillips on Ins.* (§ 404); *Hastie* agt. *De Peyster* (3 *Caines*, p. 193, et seq.); *Flanders on Fire Ins.* (34).

As to what the risk is, incurred by the reassured, cites *The Mutual Safety Ins. Co.* agt. *Hone* (2 *N. Y.*, p. 238); 3 *Kent Comm.* (279); *Park on Ins.* (2d *Am. ed.*, 277); *N. Y. Bowery Fire Ins. Co.* agt. *N. Y. Fire Ins. Co.* (17 *Wend.*, 363).

As to the meaning in the policy of reinsurance of the terms, "the interest of the assured in the property," and "the property," cites *The Mutual Safety Ins. Co.* agt. *Hone* (2 *N. Y.*, pp. 239, 240).

To the effect that payment by the primitive insurer has no bearing upon the liability of the reinsurer, cites *Hone* agt. *Mutual Safety Ins. Co.* (1 *Sandf. Rep.*, 152); *Park on Ins.* (2d *Am. ed.*, 278); *Phillips on Ins.* (§ 1752); *The Eagle Ins. Co.* agt. *The Lafayette Ins. Co.* (9 *Ind.*, 443); *Flanders on Fire Ins.* (32, 34); 2 *Bell's Law Dict.* (93, *Art. Ins.*).

On the meaning of the clause "loss, if any, payable pro



---

Norwood agt. Resolute Fire Insurance Co.

---

*rata* with the reinsured," cites *Blackstone, receiver, agt. Alemannia Fire Ins. Co.* (4 *Daly*, 299); *The Philadelphia Trust, Safe Deposit and Ins. Co. agt. Fame Ins. Co.* (Penn. *Sup. Ct., Opinion by SHARSWOOD, J., February 8, 1873*); *In the Matter of the Republic Ins. Co., cited ante.*

On reassurers' liability, under its contract that "Loss shall be paid sixty days after due proof of the same shall have been made and received at the reassurers' office, cites *Hone agt. Mutual Safety Ins. Co.* (p. 153); *The Eagle Ins. Co. agt. The Lafayette Ins. Co.* (9 *Ind.* 443); *Flanders on Ins.* (32).

To the effect that insurer, by acting upon notice of loss as received in time, waives the objection, cites *Lycoming Ins. Co. agt. Schuffler* (6 *Wright*, 42 *Penn.*, 188); *Flanders on Fire Ins.* (512). See also *N. Y. Bowery Fire Ins. Co. agt. N. Y. Fire Ins. Co.* (17 *Wend.*, 359).

To the effect that insurer, by offering to compromise, or basing refusal to pay on other grounds than want of proper notice, is estopped from setting up the insufficiency of the notice as to time, cites *Flanders on Fire Ins.* (518); *Lycoming Ins. Co. agt. Schuffler* (6 *Wright*, 42 *Penn.*, 188); *Greenfield agt. Mass. Mut. Life Ins. Co.* (47 *N. Y.*, 430).

To the effect that insurer, by denial of obligation exclusively for reasons other than those relating to the proofs, waives all defects, cites *Owen agt. Farmers' Joint Stock Ins. Co.* (57 *Barb.*, 518); *Bumstead agt. The Dividend Ins. Co.* (12 *N. Y.*, 81); *O'Niel agt. Buffalo Fire Ins. Co.* (3 *N. Y.*, 122, p. 128).

To the effect that the insurer, by failing to object to the proofs, and point out defects, waives all defects, cites *Kernochan agt. The N. Y. Bowery Fire Ins. Co.* (17 *N. Y.*, 428, p. 433); *Flanders on Fire Ins.*, 543; *Bumstead agt. Dividend Ins. Co.* (12 *N. Y.*, 81).

*D. D. Lord*, for the defendant.

On meaning of the terms, "loss," "loss to be settled," and

---

Norwood agt. Resolute Fire Insurance Co.

---

“loss payable,” cites *Mutual Safety* agt. *Hone* (2 N. Y., p. 235).

To the effect that reassurer has no privity with original insured, cites *Herckenrath* agt. *Am. Mut.* (3 Barb. Ch., 63).

To the effect that usage, contrary to the express language of policy, cannot control, cites *Hone* agt. *Mutual Safety*.

SEDGWICK, J.—The Lorillard Fire Insurance Company insured “Gage Bros. & Rice against loss or damage by fire to the amount of fifteen thousand dollars,” on specified property. The defendant, The Resolute Fire Insurance Company, made its policy, in which they do “reinsure Lorillard Fire Insurance Company on property of Gage Bros. & Rice, against loss or damage by fire, to the amount of five thousand dollars,” the property being that specified in the policy made by the Lorillard.

In the policy of reinsurance there was written the words “Loss, if any, payable *pro rata* with the reassured.” The other conditions and agreements of the policy were printed. One of these was, “Reinsurance in case of loss to be settled in proportion as the sum reinsured shall bear to the whole sum covered by the reinsured company.” The controversy relates to the construction of the written clause, “Loss, if any, payable *pro rata* with the reassured.” Evidently, this is elliptical, and words must be supplied to find its meaning.

There is no sense in the words, the loss is to be paid with the Lorillard Insurance Company, or the loss is to be paid proportionally with the Lorillard Fire Insurance Company. If you suppose that this obscurely, although by an incorrect use of words, intimates that the Resolute company is to pay the loss, with or proportionally with the Lorillard company, there would then be a reference to but one loss, viz., that which was the subject of the policy of reinsurance. It is not meant that this should be paid to the Lorillard by the Resolute and Lorillard each paying a certain portion of it.

---

Norwood agt. Resolute Fire Insurance Co.

---

The loss mentioned, it was intended should be payable *pro rata* with something else than itself.

The parties had in view two losses; one and that which was specified was provided for by the policy of reinsurance. The other, and which must be understood, was provided for by the primitive policy.

"Loss payable," is a technical term. The insured suffers a loss; the insurer, of course, does not pay this loss itself; a sum of money is paid, or agreed to be, as an indemnity for the loss. Policies provide how this sum shall be fixed, and when it is paid, the usage is to say that it pays the loss; although it may be that the sum paid is not, in fact, a compensation for the whole loss. The claim, in question, had in view this character of the two losses payable.

It should be read as follows: The loss under this policy is payable by the Resolute *pro rata* with the loss, payable by the Lorillard, under the primitive policy. It is the equivalent of saying that the Resolute is bound to indemnify the Lorillard in the same proportion that the Lorillard is bound to indemnify Gage Bros. & Rice.

Other cases which have involved the construction of a clause partly like this, differ from it, because the words in these were "*pro rata* and at the same time." We have not to consider what would be meant by these latter words; they are not before us. The clause here simply says, that the Lorillard loss is payable *pro rata*, or proportionally, with the loss payable to Gage Bros. & Rice. The defendants here insist that the stipulation refers to the fact of payment by the Lorillard, that the Resolute is to pay with the Lorillard, *i. e.*, at the same time with, or contemporaneously. This is supported only by the use of the word "with;" if the word "as" had been used, or "in proportion to" instead of "*pro rata*" "with," I do not think there would be any doubt that the reference was to the amount of the loss to be paid, and not to the time of its payment. It is, however, urged that the amount to be paid by the reinsurers is meant to be fixed



---

Norwood agt. Resolute Fire Insurance Co.

---

by the fact of payment of the loss, under the primitive policy, and that until the latter is paid there is no way of fixing what the defendants are to pay. The defendant's counsel contend that the clause means "that the loss is to be paid by the reassurers in the same ratio *as it is paid* by the reassured." We think that the first mistake here is, in not making the clause refer to the two losses that we have noticed.

There is, however, another mistake that more closely concerns the immediate point considered. "Payable" is expressive of obligation to pay; "loss payable" means loss to be paid, inasmuch as the insurer contracts that the loss shall be paid. The same element is present in the "loss payable" by the Lorillard; so that, instead of saying "the same ratio *as it is paid*," it should be "in the same ratio as it *is to be paid*," by the Lorillard, *i. e.*, in the same ratio as the Lorillard is bound to pay the loss of Gage Bros. & Rice.

Therefore, if in case of loss under the primitive policy, the Lorillard should be bound to pay, not the whole of the sum insured, but a per centage of that, then the Resolute is bound, in paying the loss of the Lorillard, to pay the same per centage of the sum covered by the policy of reinsurance. This construction sustains the rulings made by the learned judge at the trial, the exceptions to which are the subject of the appeal.

We do not see how any other construction can be maintained. The other only alternative would be to reject the clause altogether as uncertain and vague. It is said that the clause should not be interpreted in this way because such a provision is made in other parts of the policy, which are printed, and this should be held to mean something more, especially as it is in writing. Without going into unnecessary particulars, *we* say, that from a survey of the whole policy, it does not appear that it has been framed with the purpose of giving to the provisions, separately, a separate meaning, so that each shall do a particular service. The contrary appears. The clause in question is so obscure, that we

---

Norwood agt. Resolute Fire Insurance Co.

---

cannot see that it was meant, intentionally, to vary the general obligation of the reinsurer, that is, to pay the sum which it becomes bound to pay, before the reinsured has made any payment on the policy insured by it. And in its obscurity, if we give it any interpretation, it is one which presents no ambiguity. We could not, therefore, simply because the other parts of the policy make a similar provision, decide that the clause should be made to signify what in fact it does not.

The exceptions should be overruled, and the plaintiff have judgment on the verdict, with costs.

MONELL and CURTIS, JJ., concur.

---

Terry agt. Wait.

---

## COMMISSION OF APPEALS.

*Promissory note — payment — before suit or injunction — alimony.*

GEORGE L. TERRY, Receiver, &c., respondent, agt. WILLIAM WAIT, impleaded with JOHN MARTIN, appellant.

Where M. held a note against W., which T. claimed as receiver, in hostility to M., the voluntary payment of the note by W. to M., before he was enjoined or sued by T., is valid, notwithstanding W. had prior notice of such claim, and that T. intended to contest the title of M. as having been transferred to him in fraud of the rights of the judgment creditors, unless impeached for actual fraud.

As this suit was *in rem* to reach property in the hands of the defendants, it failed to be effectual, because the defendant, W., had paid the note in question to M. before the plaintiff had obtained an actual lien by the service of the injunction.

The defendant, M., never having been personally served with process, and having collected the note and taken the proceeds to Canada, he had no occasion to appear and submit to the jurisdiction of the courts of this state to try his title to said money.

His neglect to appear and answer, therefore, could not be used as evidence against the defendant, W.; and to recover against him it was incumbent upon the plaintiff to prove the allegations of fraud by other evidence.

Assuming the note was paid by the defendant, W., before this suit was commenced, as found by the court below, he was an unnecessary party to this action. The plaintiff's only remedy was to pursue the fund in the hands of M.

*Quere.* Does the marriage contract give the wife any right to contest a transfer by her husband, after marriage, made by him with intent to defraud her of her support, and to prevent her from recovering alimony? By EARL, Com.

*September Term, 1871.*

THE plaintiff recovered at special term. The allegations in the complaint appear in the opinion. An injunction was



---

Terry agt. Wait.

---

granted, as prayed for, June 8, 1863, and the same with the summons and complaint placed in the hands of the sheriff of Saratoga county, to be served June 9, 1863. That the sheriff attempted to serve the papers on said William Wait the same day, but the said William evaded the sheriff, and the latter was not able to serve said papers at that time, although he followed him with a wagon, and got near enough to tell him he had papers to serve on him.

William Wait then went to Canada and returned a few days later, but the papers were not served upon him until January 27, 1864. Martin not being found, the summons was published against him about August 1, 1863, and his time to appear and answer expired September 15, 1863, but he never appeared in the action and made default.

The cause was tried before justice BOCKES at the Saratoga special term, September 10, 1864.

On the trial William Wait testified that he paid the whole amount of said note to John Martin, June 13, 1863, and before this action was commenced, and the court so found.

William Wait was sworn in supplemental proceedings March 14, 1862, and then testified in regard to said note "it is past due," which deposition was read in evidence, and appeared in the case at folio 97, but com. EARL overlooked that fact, as appears by his opinion.

It was also found by the court that before said payment the said William Wait was notified, by the attorney of said Antha, that she claimed the transfers of said note were fraudulent, and that she should claim satisfaction of her said judgment from the amount he owed on said note.

The plaintiff did not give affirmative proof of the fraudulent transfer of said note, but relied upon the default of said Martin as admitting the same, and no point was made in the court below that such proof was necessary.

The court below decided as matter of law that the payment of said note by William Wait was void as against the plaintiff's judgment, and directed that the plaintiff recover

---

Terry agt. Wait.

---

against William Wait \$1,350.98, to cover the amount of the former judgment, with receiver's fees, &c.

The defendant, William Wait, appealed to the general term and the judgment was affirmed in the fourth district, July 12, 1866, at the Saratoga general term held by justices JAMES, ROSEKRANS and POTTER.

The defendant, William Wait, then appealed to the court of appeals, and the same was submitted on printed arguments to the commission of appeals, May 16, 1871.

*W. A. Beach*, for the appellant.

*E. F. Bullard*, for the respondent.

EARL, C.—This action was brought among other things to recover the amount of a certain note given by the defendant William Wait to David W. Wait, of whose property the plaintiff was appointed receiver.

The complaint alleges that said David W. Wait and Antha A. Wait were intermarried in 1850, and that on the 8th day of November, 1862, the said Antha A. commenced an action in the supreme court of this state against her said husband for a separation and for support and maintenance; that such proceedings were had in such action, that on the 24th day of March, 1863, a judgment was rendered therein requiring the husband to pay said Antha A. during her life for her support and maintenance the sum of \$70 annually, and to give security for the payment thereof by a bond to said Antha A. in the penal sum of \$1,000 with sureties, and also to pay the costs of said action, adjusted at \$117.71; that the husband neglected to pay the said costs or to give the said bond, and thereafter execution was issued against him to collect the said costs and the amount of the said bond in pursuance of the said judgment, which execution was returned wholly unsatisfied.

That thereafter proceedings supplementary to execution

---

Terry agt. Wait.

---

were instituted against the husband, said David W. Wait, which resulted in the appointment of the plaintiff as receiver of his property.

The complaint then further alleges that after the said inter-marriage, the said David W. owned a note against the defendant William, originally given for about \$3,000, and that he held and owned said note until about November, 1862, when he pretended to transfer it to Joseph R. Wait. "That said transfer was made with intent to defraud the said Antha, and to place the same where it could not be reached for her support.

"That previous to such transfer said David had concluded to abandon his said wife and neglect to provide for her, and, with the intent to avoid such duty and obligation, transferred said note, and with intent to defraud said Antha in that behalf and of her lawful action, damages and costs.

"That shortly after said transfer to said Joseph the said note was transferred to one John Martin, who took said note with full knowledge of all said facts and with intent to aid the said David in defrauding the said Antha in that behalf."

The complaint further alleges that the note was so transferred by said David after the same was past due, and that said David had no other property out of which the said judgment in favor of the said Antha could be collected, and demanded judgment that said note be declared the property of the said David, and that the transfer thereof be declared void, and that the defendant, William, be adjudged to pay the same to the plaintiff.

The defendant, Martin, suffered default and William Wait answered, putting in issue all the material allegations in the complaint, and alleging payment of the note.

Under the issue as thus joined, to entitle the plaintiff to recover against William Wait, it must be conceded that it was incumbent upon him to prove and establish the allegations of fraud above quoted from the complaint upon which the action was based.



---

Terry agt. Wait.

---

By the default of Martin the fact stood confessed as to him, but as against William Wait it was necessary to prove them by competent evidence.

There was not only no proof sustaining these allegations of fraud, but there does not appear to have been any attempt to prove them.

The plaintiff proved the judgment in the case of Antha A. Wait against David W. Wait, in the action for a separation, which appears to have been docketed and entered March 24, 1863, and then proved the proceedings supplementary to execution, resulting in the appointment of the plaintiff as receiver, and then rested without giving any further evidence.

There was not a particle of evidence showing any fraud or when the note was due, or when or how it was transferred. It simply appeared from a deposition of the defendant, William Wait, taken in the supplementary proceedings, that there was due, May 9, 1863, upon the note about \$2,500, and that the defendant, Martin, then claimed to own the note and to have gotten it from Joseph R. Wait, and that he claimed payment of the note to him.

The plaintiff having rested upon this evidence, the defendant moved for a nonsuit on the ground that the plaintiff had shown no cause of action, and the court denied the motion and defendant excepted.

Can it be doubted that at this stage of the case the plaintiff had failed to make out any case? He had the affirmative to show that the note was transferred by David W. Wait under such circumstances of fraud as entitled him to it, and this he did not attempt to do.

After the denial of the motion to nonsuit, it was proved that the note was transferred to Joseph R. Wait as early as 1862, about eight months before the commencement of the suit of Antha A. Wait against her husband, and that Joseph R. Wait transferred it to the defendant, Martin, and that defendant William Wait, paid the note to Martin, June 13, 1863, and took the same up. But there was no proof what-

---

Terry agt. Wait.

---

ever bearing upon the question of the alleged fraud, unless it is found in the fact that William Wait insisted upon paying and did pay the note to Martin after being notified of plaintiff's claim, with an offer of indemnity if he would pay the same to the plaintiff.

He consulted counsel and was advised to pay the note to the holder thereof. I do not see how this was evidence of any fraud against him or even of collusion. It was his duty to pay his note to the lawful holder thereof, and there is not a particle of evidence that Martin, who held the note and claimed payment thereof, was not the lawful holder and owner thereof. But it matters not what William Wait's conduct was in June, 1863, nor how much it may be liable to criticism, because the plaintiff shows no title to the note which had been transferred by David W. Wait more than a year before, and, for aught that appears, before it was due.

It was not alleged in the complaint nor proved upon the trial, nor found by the justice that the note was transferred without full consideration, and it makes no difference whether it was or not, as David W. Wait had the right in March, 1862, to give away the note.

The justice, however, found that David W. Wait transferred the note to Joseph R. Wait, and the latter to defendant, Martin, with the fraudulent intent and purpose mentioned in the complaint.

But the appellant is not concluded by this finding, as he excepted to it, and also excepted to the refusal to nonsuit. When a finding of fact is entirely unsupported by evidence, and is excepted to, such exception raises a question of law reviewable in this court.

The justice did not find that the appellant paid the note to Martin with any fraudulent intent, but he held that it was unnecessary to the decision of the case to pass upon the question, and he declined for the same reason to find that the appellant paid the note to Martin after taking legal advice, believing that he was legally bound to make such payment.

Terry agt. Wait.

---

Hence the conduct of the appellant in making such payment cannot, in any aspect of this case, be considered here.

These views lead to a reversal of the judgment below and a new trial, costs to abide the event.

GRAY, C., dissented.

NOTE.—This case is briefly reported, 48 *N. Y.*, 657, but as the questions are important, the opinion is now given in full.

LEONARD, J., who was one of the majority of the court when that decision was made, has since decided the other way upon the *obiter* doctrines laid down by EARL, C. (*See Kamp agt. Kamp*, 46 *How.*, 143, 145.)



---

People *ex rel.* Davin agt. Havemeyer.

---

## NEW YORK SUPERIOR COURT.

THE PEOPLE, etc., *ex rel.* EDWARD A. DAVIN agt. WILLIAM F. HAVEMEYER *et al.*, composing the Board of Estimate and Apportionment.

SAME agt. ANDREW H. GREEN and ABRAHAM K. EARLE.

*Mandamus—comptroller New York city—crier of court.*

The *relator* having been, prior to the year 1870, duly appointed *crier* of the court of common pleas, New York, by that court, it became the duty of the supervisors, under section 39 of the Code, to fix his salary, which was done by a resolution of the supervisors of May 26, 1870, to take effect January 1, 1870, at \$2,500 per year, which resolution was duly approved by the mayor.

Prior to the time when the resolution was passed, fixing the salary, the *relator* had, for some time, drawn his pay as any ordinary officer of the court at \$1,200 per year.

It having been urged by the corporation counsel, as the sole ground of objection to the *mandamus*, that the resolution of May 26, 1870, was invalid, because by section 7 of chapter 875 of the Laws of 1869 the supervisors were prohibited from increasing the salaries of those then in office or their successors, except as provided by acts of the legislature, and because the third section of chapter 382 of the Laws of 1870, passed April 26, 1870, contains a similar prohibition:

*Held*, that the objection had no relevancy to this case. There was no increase, because the salary had not previously been established.

*At Special Term.*

MOTIONS for writs of peremptory *mandamus*.

*Richard O'Gorman*, for the *relator*.

*E. Delafield Smith*, counsel to the corporation, opposed.

---

People *ex rel.* Davin agt. Havemeyer.

---

FREEDMAN, J.—Prior to the year 1870, the relator was appointed by the court of common pleas crier of said court, and ever since that time he has performed, and is still performing, the duties of that office. He is not an ordinary attendant on the court, but an officer whose appointment is specifically prescribed by statute. Section 39 of the Code provides that he shall receive a salary to be fixed by the supervisors and to be paid out of the county treasury. For a long time, however, his salary was not fixed, and during that time he received payment for his services under the designation of an officer of said court at the rate of \$1,200 per annum, which was the compensation paid to the ordinary attendants on said court. In the early part of 1870, a question was raised as to said pay, and, to settle the matter, an application was made to the supervisors to fix his salary as such crier. The supervisors, by resolution of May 26, 1870, which was duly approved by the mayor, fixed the same at \$2,500 a year, to take effect January 1, 1870. After such fixation the relator was designated in the pay-roll as crier, and for part of the time, since elapsed, he was paid as such at the rate thus fixed. There is not the slightest dispute as to these facts.

The learned counsel to the corporation has urged, however, as the *sole* ground of objection, that the resolution of May 26, 1870, is invalid, because by section 7 of chapter 875 of the Laws of 1869, the supervisors were prohibited from increasing the salaries of those then in office or their successors, except as provided by acts of the legislature, and because the third section of chapter 382 of the Laws of 1870, passed April 26, 1870, contains a similar prohibition.

This objection has no relevancy to the present case. There was no increase, because the salary had not previously been established. No augmentation can take place of a thing that is not in existence. The resolution fixed for the first time what a special statute had directed to be done. Section 2 of

---

People *ex rel.* Davin agt. Havemeyer.

---

chapter 10 of the Laws of 1855 is, therefore, equally inapplicable.

Having been lawfully appointed crier, having discharged the duties of the office, and having committed no act which could be construed into a waiver of his legal rights, but having, on the contrary, received under protest the moneys paid to him by the finance department since September 1st, 1871, the relator is justly and fairly entitled to the balance due him under said resolution.

Peremptory writs must issue as prayed for.



---

Kelly agt. Bernheimer.

---

## SUPREME COURT.

EUGENE KELLY and JOSEPH DONAHUE, respondents, agt.  
EMANUEL BERNHEIMER and another, appellants.

*Election of defenses — warranty — fraud — rejection of evidence.*

The court has no power to require defendants to *elect* upon which of their defenses they will rely, where more than one is set forth in the answer, and evidence is given tending to prove their truth, unless they are so far inconsistent that both cannot properly co-exist in the same transaction. That is not the case as to the defenses of *warranty* and *fraud* in the sale of property.

The rejection of evidence offered by defendants to prove the statements made by the plaintiffs' agent, who had charge of the sale of the property, as to its value, etc., made to the defendants' agent just before the contract was made for its purchase, was *error*. It was the only mode in which the fraud, if it existed, could be proved.

It was also error to exclude evidence of one of the defendants by whose act the purchase was made, to show that the conversation between these agents of the plaintiffs and defendants, respecting the property, was communicated to him, and that he acted on it in making the purchase.

*First Department, General Term, January, 1874.*

NOAH DAVIS, *P. J.*, DONOHUE and DANIELS, *JJ.*

APPEAL from judgment and from order denying motion for new trial.

*D. M. Porter*, for appellants.

On the question of what constituted warranty, cited *Mills* agt. *Selwood* (61 *Barb.*, 238); *Messenger* agt. *Pratt* (3 *Lansing*, 234).

A positive affirmance of a fact is a warranty, *Sweet* agt. *Bradley* (24 *Barb.*, 549); *Roberts* agt. *Morgan* (2 *Cow.*, 438);

---

Kelly agt. Bernheimer.

---

*Chapman* agt. *March* (19 *John.*, 290); *Duffee* agt. *Mason* (8 *Cow.*, 25); *Carley* agt. *Wilkins*, (6 *Barb.*, 557); *Edick* agt. *Crim* (10 *Barb.*, 445); *Mason* agt. *Lord* (40 *N. Y.* 476).

As to the election of actions required by the court, *Quintard* agt. *Newton* (5 *Robt.*, 72); *Harsen* agt. *Bayard* (5 *Duer*, 656); *Osborn* agt. *Bixby* (9 *How.*, 57); *Hallenbeck* agt. *Clow* (*id.*, 290); *Smith* agt. *Wells* (20 *id.*, 167); *Springer* agt. *Dwyer* (50 *N. Y.*, 19).

Exclusion of proper evidence, *Holman* agt. *Dord* (12 *Barb.*, 336).

*Aug. F. Smith*, for respondents.

Defense of a rescision of the contract not available, election of actions did defendants no harm, *Hogan* agt. *Wezer* (5 *Denio*, 389); *Cobb* agt. *Hatfield* (46 *N. Y.*, 533); *Pomeroy* agt. *Shaw* (2 *Daly*, 267); 2 *Kent*, 480 (*margin*); *Story on Sales* (§§ 452, 426, 427, 456).

Question of warranty, *Duffee* agt. *Mason* (8 *Cow.*, 25); *Whitney* agt. *Sutton* (10 *Wend.*, 412); *Prentice* agt. *Dike* (6 *Duer*, 220, 224); *Reed* agt. *Randall* (29 *N. Y.*, 358); *Howard* agt. *Hoey* (23 *Wend.*, 350); *Fisher* agt. *Samuda* (1 *Camp.*, 190, *note a*, p. 194); *Hargous* agt. *Stone* (1 *Seld.*, 73, 86, 87).

DANIELS, J.—This action was brought to recover the price of barley sold and delivered by the plaintiffs to the defendants. The defenses relied upon at the trial were, that the barley by the terms of the sale was warranted to be of a quality that it proved much inferior to, and that the defendants were induced to purchase it by means of fraudulent representations made by a person having charge of its sale for the plaintiffs. After the defendants had rested their defense, the court, upon the application of the plaintiffs, compelled them to elect upon which of their two defenses they would proceed; and after excepting to the decision requiring this election, they elected to proceed upon the warranty. This

---

Kelly agt. Bernheimer.

---

required an abandonment of the other defense and of the evidence given which it might be claimed tended to support it.

The court has no power to require defendants to elect upon which of their defenses they will rely where more than one is set forth in the answer, and evidence is given tending to prove their truth, unless they are so far inconsistent that both cannot properly coexist in the same transaction. That it is very manifestly not the case as to the defenses of warranty and fraud in the sale of property. For the vendor may fraudulently misrepresent the nature, quality and condition of the property sold, and at the same time contract for or warrant the existence of the attributes indicated by the representations made. Both may be true, and one does not in any manner merge the existence of the other. In the present case, what transpired before the final contract of sale was made, tended to establish the truth of the defense, depending on the fraud, while if the warranty was made at all it was when the terms of the sale were finally arranged. Both could very well be true, and the claim to maintain them involved neither impropriety nor inconsistency. The court, therefore, erred in requiring the defendants to elect between the two. But it is claimed that the defendants were in no way injured by the decision, because this part of the defendants' answer, setting up fraud, relied upon it simply for a rescission of the sale. This, however, is too narrow a view of the allegations contained in it; for in addition to the averment that the defendants, upon the discovery of the fraud, tendered the barley to the owners and repudiated the transaction, it is further alleged that the barley at the time of the sale was not worth over one dollar per bushel. As the purchase price was two dollars per bushel, this was sufficient to show that they had sustained damages by the means of the fraud to the extent of the difference between the price and its real value. This was sufficient to warrant the defendants in claiming an allowance, by way of counter-claim, of the difference on such portion of it as the evidence might sustain



---

Kelly agt. Bernheimer.

---

the propriety of allowing, particularly as issue was taken upon it by the plaintiff's reply. The answer was evidently predicated on the intention of claiming the difference shown by it between the value and what should appear to be the price of the barley in case a rescision of the sale could not be secured; and the reply took issue with it in that view; for it denied every allegation of the answer constituting *or intended* to constitute a counter-claim. Besides, no objection of this character was taken, at the trial, to the answer itself, or to the admissibility of any evidence tending in any respect to prove that a fraud had been committed in the sale of the barley. It is quite clear that the ruling requiring the election of the defenses cannot be justified by any deficiencies in the answer. Then the election was not required, for the reason it assumed that both were properly alleged by requiring an election between them, without any objection being made as to the sufficiency of the allegations setting forth the defenses.

The evidence tended very decidedly to show that the barley was old and of an inferior quality, unsuited for malting, which was the purpose for which the defendants purchased it, and worth much less than what would have otherwise been its value. For the purpose of sustaining the defense resting upon the allegations of fraud, what Tilden, the plaintiff's agent in selling it, said concerning its quality, just before the contract was made for its purchase, was admissible in evidence. That was really the only mode in which the fraud could be proved, if in fact it had any existence. For that purpose, his statements to Cornell, who acted for and represented the defendants when the barley was being changed from the vessel to the lighter, ought to have been received, as they offered to show that he communicated what was said to the defendant who made the contract for the purchase of the barley, and that he acted upon it in making that purchase. The statement was at first received, and it tended to show that the agent said that the barley was good and

---

Kelly agt. Bernheimer.

---

new, and that he knew all about it. But the court held that what was said when the barley was being unloaded, and which in fact was just before the purchase, had nothing to do with the case. This was clearly error, and that error is presented for consideration by the exception which was taken to the decision. The statement made contained a misrepresentation which the evidence tended to show was untrue. And if the agent knew all about the barley, then he knew it was not good or new, if the other evidence as to its quality and condition was entitled to reliance. The court also decided not to permit the defendant by whose act the purchase was afterwards made to testify that the conversation between Cornell and Tilden was communicated to him, and that he acted upon the statements in making the purchase. This offer was entirely proper, for the evidence, if it had been received, would have tended to show that the defendant's conduct was influenced by the representations. That is always a matter of fact, to be proved in support of claims like the one which the defendants made; and it may be established by direct as well as indirect evidence, or both, when that may be within the power of the party.

The evidence as to fraud was not of a very decided character, but it was sufficiently so for the consideration of the jury; and the defendants were not prevented from submitting it to them because it was deemed to be in any respect defective, but simply for the reason that they should elect between the two different defenses which their proof had a tendency to establish. The ruling upon this subject, as well as those relating to the proofs offered by the defendants to establish the defense of fraud, cannot be sustained; and for the reasons already given, the judgment and the order denying a new trial should be reversed, and a new trial directed, with costs to abide the event.

---

Laidlaw agt. Gilmore.

---

## N. Y. COMMON PLEAS.

*Conveyance—real estate—fraud of creditors.*

WILLIAM LAIDLAW *et al.*, plaintiffs and appellants, agt.  
WILLIAM GILMORE and SAMUEL KISSICK, defendants and  
respondents.

Where a conveyance of real estate is made for a fair and reasonable consideration, the court will not be warranted in declaring the same fraudulent and void, as against the grantee, unless either fraud or a fraudulent intent be made to appear on his part as well as on the part of the grantor.

And although the grantee had accepted the conveyance with knowledge that the grantor was in embarrassed circumstances, that would not necessarily imply that he took it with a fraudulent intent.

Where it appeared that the grantee, prior to receiving a conveyance from the grantor, was a large creditor of the latter, having, in good faith, loaned and advanced to him at different times a large amount of money, *held*, that there was nothing unlawful or improper in the grantor's preferring the grantee to his other creditors, and transferring some of his property in payment of his indebtedness; and the latter had a perfect right to receive the same in satisfaction of his just indebtedness, provided no fraudulent intent entered into the transaction.

Where the amount of indebtedness of the grantor, of over \$13,500, was discharged in consideration of the conveyance of the premises from him to the grantee, and where it appeared by the decided weight of evidence that said premises were not worth over \$14,000 or \$15,000, *held*, that this was not such inadequacy of consideration as to justify the court in setting aside the deed on that ground. (*Affirmed by the court of appeals March term, 1874.*)

*General Term, November, 1873.*

*Before DALY, Ch. J., LOEW and ROBINSON, JJ.*



---

Laidlaw agt. Gilmore.

---

APPEAL from a judgment of the special term in favor of the defendants.

The facts sufficiently appear in the opinion of the court.

*David McAdam*, for plaintiffs, appellants.

*Stickney & Whipple*, for defendants, respondents.

LOEW, J.—This action was brought on the equity side of the court, for the purpose of having a conveyance of a house and lot of land, in West Fifty-second street, in this city, adjudged fraudulent and void, as against the plaintiffs, who are judgment creditors of the defendant, Gilmore.

Although the judgment against Gilmore was not recovered until nearly three months after he had conveyed the premises in question to his brother-in-law, the defendant, Kissick, yet the indebtedness accrued previous to the time when the transfer was made.

The judge, before whom this cause was tried, has found, as matter of fact, that at the time of said conveyance the defendant, Kissick, had no knowledge that Gilmore was indebted to any person besides himself. This finding is supported by the evidence of the defendants, both of whom were examined on the part of the plaintiffs.

But even though Kissick had accepted the conveyance, with knowledge that Gilmore was in embarrassed circumstances, that would not necessarily imply that he took it with a fraudulent intent. And, where the conveyance is made for a fair and reasonable consideration, the court would not be warranted in declaring the same fraudulent and void, as regards the grantee, unless either fraud or a fraudulent intent be made to appear on his part, as well as on the part of the grantor (*Carpenter* agt. *Muren*, 42 *Barb.*, 300; *Waterbury* agt. *Sturtevant*, 18 *Wend.*, 353).

In the case at bar, the learned judge has found that there was no intent to hinder, delay or defraud the creditors of Gil-

---

Laidlaw agt. Gilmore.

---

more, either in the making or acceptance of said conveyance. This the evidence authorized him to find, at least, in so far as the defendant, Kissick, was concerned. It is not disputed that the latter was a creditor of Gilmore's to a large amount, for money which he had in good faith loaned and advanced to him at different times. There was, therefore, nothing unlawful or improper in Gilmore's preferring Kissick to his other creditors, and transferring to him some of his property in payment of this indebtedness; and the latter had a perfect right to receive the same, in satisfaction of his just demands, provided no fraudulent intent entered into the transaction (*Auburn Exchange Bank agt. Fitch*, 48 Barb., 344; *Waterbury agt. Sturtevant*, *supra*).

It is, however, urged that the consideration paid for the premises was inadequate. It is true, the witness, Henry, swears that in April, 1869, he sold an adjoining house for \$22,000, and gives it as his opinion that the premises in question were worth the same. But the uncontradicted testimony of the witness, Martin, shows that property, in that neighborhood, depreciated from twenty to forty per cent between April, 1869, and November of the same year, when the conveyance to Kissick was made. He, therefore, fixes the value of the house and lot in question, at that time, at from \$14,000 to \$15,000.

Now, it appears from the evidence that the consideration paid by Kissick to Gilmore for said conveyance, by releasing the latter from his indebtedness to him, and assuming the payment of a mortgage and other incumbrances on the property, exceeded in amount \$13,500. This consideration is not so obviously and clearly inadequate as to justify us in holding that the judge below erred in finding that the conveyance was made for nearly or quite the fair market value of said premises, and deciding that it should not be adjudged fraudulent or otherwise interfered with on that ground.

That there are suspicious circumstances in this case cannot be denied. And, although fraud need not necessarily be

---

Laidlaw agt. Gilmore.

---

proved by direct evidence, but may also be inferred from the circumstances (*Newman* agt. *Cordell*, 43 *Barb.*, 448), nevertheless, in the present case, we think they are insufficient to warrant us in finding or concluding that the grantee intended to hinder, delay or defraud the creditors of Gilmore, and more especially as the judge at special term has found that there was no such intention on his part.

The judgment should be affirmed.

DALY, Ch. J., and ROBINSON, J., concurred.

Judgment was entered for the defendants in accordance with the above opinion, and the plaintiffs appealed to the court of appeals, which court, in March, 1874, held that the judgment was correct, and affirmed the same.



---

Adrience agt. Lagrave.

---

Reversed 47 How 385  
1 Hun 689. 4 J+6. 215  
See 59 N.Y. 110. 4 J+6 iii

## SUPREME COURT.

JAMES B. ADRIENCE and others, plaintiffs, agt. ALFRED E.  
LAGRAVE, defendant.

HERMAN BACHARACH and another, plaintiffs, agt. ALFRED E.  
LAGRAVE, defendant.

*Jurisdiction — arrest — citizenship.*

Where the defendant was kidnapped in France and by force brought into this state against his will, through the fraudulent intrigue and management of some of his creditors here, on pretended extradition proceedings with the government of France, to answer a criminal charge here:

*Held*, that those creditors who were ignorant of such proceedings in bringing the defendant here and took no part therein, could legally arrest the defendant in civil actions and proceed in them, under the jurisdiction of the court, to judgment and imprisonment, although the fraud of the other creditors who were engaged in such proceedings precluded them from arresting the defendant in any civil action.

*New York Special Term, April, 1874.*

MOTION to set aside service of summons and complaint, and to vacate order of arrest.

The facts sufficiently appear in the opinion.

*Charles W. Brooks*, for the motion.

*D. M. Porter & L. A. Gould*, opposed.

I. The defendant avers, on *information and belief only*, that the plaintiffs had something to do with his being brought back to this country; this they *positively and fully deny*.

---

Adrience agt. Lagrave.

---

The burden of proving any such fraud against the plaintiffs lies upon the defendant who asserts it; he has wholly failed to prove it (*Henry* agt. *Henry*, 8 *Barb.*, 588).

II. The defendant was brought into this state, as the papers show, as a fugitive from justice upon a criminal charge from which the order of judge FANCHER does not discharge him. An order of arrest issued against him, after he is so brought within the jurisdiction of the court, will not be set aside (*Williams* agt. *Bacon*, 10 *Wend.*, 636).

III. The language used in the opinion of Mr. justice DANIELS, relied on by the defendant, was wholly *obiter*, and rests, it is respectfully submitted, upon no sound authority or reason.

It is conceded, because not denied, that these plaintiffs have a just cause of action against the defendant, and are entitled, under the Code, to an order of arrest against him, how can they be deprived of that right without any act or default whatever on their part?

How can it be pretended that the defendant may escape the just and legal consequences of a fraud against *them*, because other parties have committed a fraud against *him*?

If it be urged that the latter fraud brought him within the reach of his own victims and enabled them to seize his person, a conclusive answer, if one were needed, is that his remedy is against the parties who enticed or forced him back to this country.

IV. But if, upon any conceivable ground, this doctrine could be maintained, the fact appears that when the orders of arrest were issued in these actions the defendant had been long discharged from custody, under the alleged fraudulent orders of arrest, and was at liberty, so far as they were concerned, to return to France.

He failed to do so; the plaintiffs, upon just grounds, finding him here, like any fraudulent debtor took the measures provided by law against him.

The motions should be denied, with costs.

---

Adrience agt. Lagrave.

---

LAWRENCE, J.—The defendant at the time the summons and complaint and orders of arrest in these actions were served upon him, was within this state, and therefore presumptively subject to the process and orders of this court. To sustain the claim that the defendant was not at the time of the service of the summons and complaint and orders of arrest subject to the jurisdiction of this court, it is alleged, by the defendant, in his moving affidavits, that the plaintiffs in these actions were parties to the alleged fraudulent arrangement or conspiracy between one James Mooney and various creditors of the defendant, in pursuance of which the defendant was kidnapped in France by Mooney, and by a requisition in a criminal charge extradited to this state; that the design of bringing him within the jurisdiction was in order to arrest and hold him to bail in civil actions.

So far as those creditors of the defendant who were parties to such arrangement are concerned, this court has already held that the defendant was entitled to be discharged from arrest in suits brought by such creditors, on the ground that an arrest procured by a trick or fraud is illegal (*See Lagrave's Case* 45 *How. Pr. R.*, 301; *S. C.*, 14 *Abb. [N. S.]*, 336, and cases cited in opinion of FANCHER, J.).

In these cases, however, the allegations in the defendant's affidavits, that the plaintiffs were concerned in or parties to the trick or device by which the defendant was transported from France to this state are flatly denied, and it seems to me, therefore, that the defendant cannot, as against these plaintiffs, claim that his person has been wrongfully brought within the jurisdiction of this court.

In the case of this defendant, judge DANIELS held, that a creditor who has not participated in the wrongful proceedings against the defendant, might lawfully seize him with a summons in a civil action (*Lagrave's Case*, 14 *Abb. [N. S.]*, 344).

I see no good reason, why, if such a creditor can seize the defendant with a summons and thus institute a civil action against him, he is not entitled to resort to all the remedies



---

Adrience agt. Lagrave.

---

which the law gives to the plaintiff, as incidental or auxiliary to such action. If the defendant is subject to the process of the court for the purpose of commencing the action, it seems to me conclusively to follow, that he is amenable to all orders and processes which may naturally arise and grow out of such action. It being therefore denied by the plaintiffs, that they were parties to the arrangement, by which the defendant was wrongfully brought within the territory of this state, and the presumption being in favor of the jurisdiction of the court, and it being also incumbent upon the defendant to establish affirmatively that he was not within nor subject to such jurisdiction, at the time of his arrest and of the service of the summons and complaint, I am of the opinion that these motions should be denied.

Motions denied with ten dollars costs in each case.

NOTE.—The short answer (we presume) which the defendant makes to these proceedings is that he is a citizen of France, either by birth or adoption, and under the protection of that government, and that our courts have no jurisdiction over his person; that the perfidy and fraud and kidnapping by which, against his will, he was compelled to come here, has not, in the least, changed or altered his *status* as a citizen of France.

The question now is, can these creditors in civil actions, or the people in criminal proceedings, *adopt* the perfidy, wrong and fraud which brought the defendant here, and proceed against him to judgment and imprisonment in our courts?

It seems that this case would bear examination in the court of appeals—  
REP.

---

Kurkel agt. Haley.

---

## SUPREME COURT.

ADAM KURKEL agt. CHARLES T. HALEY and others.

*Easement — possession — ejectment.*

A person, in whose favor an easement or servitude exists, cannot be disturbed in its enjoyment by an action of ejectment or writ of possession in favor of the owner of the land on which the easement is impressed.

The action of ejectment is brought to recover the "*possession*" of land; and although, in such action, it may appear that the plaintiff is the owner of the fee, yet he cannot recover the *possession* when the land is subject to an easement or servitude in favor of the defendant, which would be thereby disturbed.

In such case the judgment should disclose the estate and interest of both parties, and that the plaintiff is entitled to the possession when the easement shall come to an end.

*Trial Term, 1874.**S. F. Higgins, for plaintiff.**Paddock & Cannon, for defendants.*

VAN VORST, J.—When Dugro conveyed the lot, and building thereon, to the party through whom the defendant Haley derives title, the easterly wall of the building rested upon and covered the strip of land, for the possession of which this action is brought, and which at the time belonged to the grantor. An easement or servitude was thereby created in favor of the grantee, so that the wall should remain upon said strip, so long at least as the building should endure.

Such easement commenced as a right in the grantee so soon as Dugro severed his estate and made the conveyance in question, and exists in favor of the defendants.

When the conveyance was subsequently made by Dugro to

---

Kurkel agt. Haley.

---

Webster, the grantor of the plaintiff of the strip of land described in the complaint, the latter is presumed to have taken the same with reference and in subordination to the easement in favor of the owner of the building in question (*Lampman agt. Mills*, 21 N. Y., 505).

The plaintiff, when he became seized of the land, took it impressed with such servitude. As the building, with its eastern wall, still rests on the land, the plaintiff is not entitled to the immediate possession of the same.

The defendant cannot be disturbed in the enjoyment of this easement by an action of ejectment, nor by a writ of possession, which would follow the recovery of judgment in plaintiff's favor.

This was decided in *Bundage agt. Warner* (2 Hill, 145 ; and see *Rogers agt. Sinsheimer*, 50 N. Y., 646).

The evidence clearly establishes that the fee to the premises in question is lawfully in the plaintiff, and that the only interest of the defendant therein is a right to the undisturbed enjoyment of the easement in question whilst the building endures.

The action of ejectment is brought to regain the possession of real property, and the judgment therein, where the plaintiff prevails, is that he recover the possession of the premises (2 *Revised Statutes*, 308, §§ 26, 33).

In *Hunter agt. The Trustees of Sandy Hill* (6 Hill, 407), it was held that whatever shows the plaintiff is not entitled to immediate possession constitutes a defense, and that, unless entitled to such immediate possession, plaintiff cannot recover.

In *Rowan agt. Kelly* (18 Barbour, 488), BROWN, P. J., says: "The true test of this action seems to be that the thing claimed should be a corporeal hereditament; that a right of entry should exist at the time of the commencement of the action, and that the interest be visible and tangible, so that the sheriff may deliver the possession to the plaintiff, in execution of the judgment of the court" (*Child agt. Cheppell*, 5 Seld., 246, 252).



---

Kurkel agt. Haley.

---

As this action is brought for such immediate possession, and such being the judgment demanded by the plaintiff's complaint, he cannot recover such possession. The findings of fact and conclusions of law upon which judgment is to be entered will show the interest of the parties respectively in the premises in question, and that the plaintiff is not entitled to actual possession thereof.

Judgment should be for the defendant.

---

First National Bank of Plattsburgh agt. Bush.

---

## SUPREME COURT.

FIRST NATIONAL BANK OF PLATTSBURGH agt. JOHN BUSH  
and NATHAN BEENAN, impleaded, &c.

*Costs — extra allowance.*

Where judgment is ordered for plaintiff (by default) on the ground of the frivolousness of the defendants' demurrer, the plaintiff is entitled to an *extra allowance of costs* under section 309 of the Code.

*Schenectady Special Term, April 21, 1874.*

*Before Hon. J. S. LANDON, J.*

THE action was brought upon a promissory note, \$2,000, made by defendant, Bush, and indorsed by defendant, Beenan.

The complaint was drawn under section 162 of the Code.

The defendants, Bush and Beenan, demurred upon the ground that the complaint did not state facts sufficient to constitute a cause of action.

The plaintiff gave notice of application for judgment upon the demurrer, as frivolous under section 247 of the Code.

The defendants did not appear to oppose the application, and no affidavit of good faith or of merits was presented.

Judgment for the plaintiff upon the demurer, with costs, was ordered.

*L. W. Holcomb*, for the plaintiff, thereupon moved for a further allowance of costs of five per cent upon amount claimed, under section 309 of the Code, and cited *Witherhead* agt. *Allen* (28 Barb., 662); *King* agt. *Stafford* (5 How. Pr. R., 30); *S. C.* [*General Term*], 6 *id.*, 127); *Fowler* agt. *Houston* (1 C. R., 51); *Anonymous* (12 How. Pr. R., 317).

---

First National Bank of Plattsburgh agt. Bush.

---

LONDON, J., said there could be no doubt the decision upon the application was a judgment, and that the plaintiff was entitled to a further allowance of costs sufficient to reimburse for the additional trouble and expense occasioned by the interposition of the frivolous demurrer.

Motion granted.



---

Caspar agt. O'Brien.

---

## N. Y. SUPERIOR COURT.

JACOB CASPAR, plaintiff and respondent, agt. JAMES O'BRIEN,  
Sheriff, &c., defendant and appellant.

*Evidence — admissibility — questions of fact and law.*

Where a witness on the trial, who claimed to be the owner of a store and the goods therein, turned out and delivered to the plaintiff a portion of said goods to secure a loan of money, was asked, "At that time who did these goods belong to?" after objection by defendant as calling for a conclusion of law from the witness and being overruled, answered, "that at that time the said goods belonged to him; that they belonged to him when he gave them to the plaintiff as security;" the witness then testified that his name was up in the store, and that he was in possession of the store; he was then asked the further question, "and the owner of it at that time?" which was objected to by defendant on the same ground as the other question; which being overruled the witness answered, "yes, sir:"

*Held*, that these interrogatories called for a *fact* and not for a conclusion of law, as claimed. The witness was in a position to know how the fact in that respect was, and the questions were properly admissible. For authority on this point see *Walsh* agt. *Kelly* (42 Barb., 98), which involved a precisely similar question. In *Knapp* agt. *Smith* (27 N. Y., 277); *Sweet* agt. *Tuttle* (14 N. Y., 467), and *Davis* agt. *Peck* (54 Barb., 425), analogous questions were sustained for the same reason.

*General Term, November, 1873.*

*Before BARBOUR, C. J., MONELL and FREEDMAN, JJ.*

APPEAL from judgment entered upon the verdict of a jury in favor of the plaintiff, and from order denying defendant's motion for a new trial upon the judge's minutes.

*A. Oakey Hall*, for appellant.

*R. S. Newcombe*, for respondent.

---

Caspar agt. O'Brien.

---

*By the Court, FREEDMAN, J.*—This action was brought by the plaintiff against the late sheriff of the city and county of New York to recover the value of certain merchandise taken by said sheriff from the possession of the plaintiff under process of court, not directed against the plaintiff. In March, 1869, the goods were sold by Wheelright, Pippey & Co., of New York, to the firm of Marks & Cohen, then doing business at No. 100 Chambers street in the city of New York. Shortly afterwards, the goods were sent to Patterson, N. J., where Marks & Cohen kept a branch store. Evidence was also given that in May, 1869, another Marks, named Harris Marks, bought out the store of Marks & Cohen at Patterson, together with the stock of goods therein contained, which included the merchandise above referred to. Harris Marks is a son-in-law of the plaintiff, and plaintiff claimed that on the 16th of June, 1869, he, through his agent, one Jacobs, who is another son-in-law of plaintiff, advanced \$750 to Harris Marks, and that he received through said agent, as security for the loan, the merchandise in controversy. It was contained in four cases, and sent from Patterson to New York. The sheriff levied upon these cases while they were on storage in the storehouse No. 28 Jay street, in the name of the plaintiff, under and by virtue of an attachment procured by Wheelright, Pippey & Co. against the property of Marks & Cohen; and in doing so claimed that they really belonged to Marks & Cohen, and that the ownership in Harris Marks, as claimed on the part of the plaintiff, was simulated, and constituted merely part of a scheme to defraud the creditors of Marks & Cohen. The questions of fact involved in the case were fully and fairly submitted to the jury under a charge to which the defendant took no exception, and they were determined by the jury in favor of the plaintiff. No motion to dismiss the complaint was made at any time, nor did the defendant ask for the direction of a verdict. Defendant's motion for a new trial upon the judge's minutes was,

---

Caspar agt. O'Brien.

---

therefore, properly denied (*Rowe* agt. *Stevens*, 12 *Abb. [N. S.]*, 389).

The only remaining questions relate to the rulings of the court below, in permitting Harris Marks to answer certain interrogatories. He was called as a witness for the plaintiff, and placed upon the stand after defendant had rested. He testified that in June, 1869, he had a money transaction with the plaintiff; that he took \$750 from the plaintiff and gave him goods as security therefor. He was then asked: "At that time who did these goods belong to?" The defendant, by his counsel, objected to the question on the ground that it was incompetent, and that it called for a conclusion of law on the part of the witness, and not for a statement of fact. The court overruled the objection and permitted the question to be answered; to which ruling the defendant excepted. The witness thereupon testified that at that time the said goods belonged to him; that they belonged to him when he gave them to the plaintiff as security; that he delivered them to Jacobs in Patterson; that the name of Harris Marks was then up in the store, and that he was in the possession of the store. He was then asked the further question: "And the owner of it at that time?" This the court also permitted to be answered against the objection and exception of the defendant; and the witness said, "Yes, sir, I think about a week or two previous to the time I borrowed that money of Mr. Caspar I had been in possession of the store." These inquiries called for a fact, and not for a conclusion of law, as claimed. The witness was in a position to know how the fact in that respect was. The questions were, therefore, admissible, and it was the office of a cross-examination to discover whether the witness stated in his answer a fact or a conclusion. This was expressly held in *Walsh* agt. *Kelly* (52 *Barb.*, 98 [104]), which involved the admissibility of a precisely similar question. In *Knapp* agt. *Smith* (27 *N. Y.*, 277); *Sweet* agt. *Tuttle* (14 *N. Y.*, 467), and *Davis* agt.



---

Caspar agt. O'Brien.

---

*Peck* (54 *Barb.*, 425), analogous questions were sustained for the same reason.

Neither the questions in the case at bar nor the answers thereto were subject to the criticism that they or either of them embraced the whole merits of the case and left nothing for either court or jury to decide. The inquiries were as to the fact of naked ownership at a particular time, while the issue to be determined by the jury involved the *bona fides* of the possession and ownership at the time of the loan made by the plaintiff.

The judgment and order should be affirmed, with costs.

BARBOUR, C. J., and MONELL, J., concurred.

---

Powers agt. Conroy.

---

## SUPREME COURT.

JULIA POWERS agt. CATHARINE CONROY and SAMUEL CONROY.

*Trespass — non-payment of rent — title to real property — costs.*

Where the issue, in an action of trespass, is made by the plaintiff and the trial is had upon the plaintiff's *right to the possession* of the premises, after his alleged non-payment of rent, the title to real property comes in question on the trial.

And where the referee finds in favor of the plaintiff for twenty-five dollars damages upon disputed evidence as to the payment of rent, the plaintiff is entitled to the *costs* of the action.

*Jefferson Special Term, April 14, 1874.*

MOTION in the nature of an appeal from the action of the clerk of Jefferson county, adjusting costs in favor of the plaintiff, and refusing to allow costs to the defendants.

The plaintiff, on a trial before a referee, recovered twenty-five dollars damages, and both parties presented bills of costs to the clerk for taxation. The clerk taxed costs for the plaintiff.

The plaintiff in her complaint alleged that she, as tenant of the defendant Catharine Conroy, was in possession of certain rooms in a building belonging to her, and that she wrongfully broke and entered into said rooms, and carried out the plaintiff's furniture, and damaged the same, etc.

The defendants denied the allegations of the plaintiff, and set up the terms of the verbal lease, which was from week to week; alleged that the plaintiff refused to pay rent, that the defendant removed some of plaintiff's things, in no manner injuring them, etc., which were the same trespasses, wrongs and injuries set forth in the complaint.

---

Powers agt. Conroy.

---

The referee finds the agreement as to rent, that the plaintiff was to pay one dollar per week, every Saturday night; "That May 2, 1871, the rent was fully paid up to the Saturday night previous to the alleged trespass. That on the next Tuesday, about May 2, 1871, the defendant Catharine requested the plaintiff to leave the premises and surrender possession. That no rent was due till the Saturday night next ensuing. \* \* \* That thereupon, and on Tuesday, and Wednesday, May the third, the defendant unlawfully, and with a strong hand, entered said rooms and took therefrom portions of plaintiff's furniture, etc., and carried them down stairs to her wood shed, and attempted to take forcible possession of the said premises without due process of law, contrary to plaintiff's wishes and her rights, and that the defendant unlawfully and wrongfully interfered with plaintiff's enjoyment of the premises."

The referee certified "that it was a disputed and litigated question at the trial as to whether the plaintiff was or not a tenant or trespasser upon the premises; that it was disputed as to whether the rent was paid up till the Saturday following the Tuesday when the cause of action arose."

The referee assessed plaintiff's damages at twenty-five dollars, and directed judgment for that amount.

The defendants now move to have the costs of plaintiff stricken from the judgment, and for an order that costs be taxed in their favor.

*Wynn & Porter*, for the motion.

*D. O'Brien*, for plaintiff, opposed.

HARDIN, J.—To enable the plaintiff to recover it was only necessary to allege and prove:

1. The actual possession of the premises.
2. Wrongful entry by the defendants.
3. The damages.



---

Powers agt. Conroy.

---

A general denial of these allegations, and evidence confined to them, would not have presented upon the pleadings or upon the trial the title to real property, nor "a claim of title" (7 *Wend.*, 495; 15 *Abb.*, 449).

But the defendant alleged a right to interfere with the plaintiff's possession. The referee certifies "it was a disputed and litigated question as to whether the plaintiff was or not a tenant or trespasser upon the premises;" and he also certifies "it was disputed as to whether the rent was paid up till the Saturday following the Tuesday when the cause of action arose."

It thus appears that the trial was not upon the question of actual possession of the plaintiff of the premises, *but the plaintiff's right to the possession* was challenged and disputed or brought in question upon the trial, and that question was determined by the referee in favor of the plaintiff.

The issue made by the plaintiff in respect to plaintiff's right of possession brought "a claim of title to real property in question at the trial" (*Code*, § 304).

In *Ehle agt. Quackenbuss* (6 *Hill*, 538), BEARDSLY, J., clearly points out the distinction between an issue as to *actual* possession and an issue as to *the right of possession*, and declares that the issue as to *the right of possession* involves a question as to a claim of title to real property.

The same principle has been asserted in numerous other cases, and controls the question presented here (*Rathbone agt. McConnell*, 20 *Barb.*, 311; *S. C. affirmed*, 21 *N. Y.*, 466; *Powell agt. Reese*, 8 *Barb.*, 567; *Brownell agt. Kelly*, 10 *How.*, 406 and 414; *Muller agt. Beyard*, 15 *Abb.*, 449; *Main agt. Cooper*, 26 *Barb.*, 468; 25 *How.*, 289; *Craven agt. Price*, 53 *Barb.*, 443).

The plaintiff is entitled to the costs of the action, and the motion is, therefore, denied.

Ordered accordingly.

---

Newfield agt. Copperman.

---

## N. Y. SUPERIOR COURT.

ABRAHAM NEWFIELD, plaintiff, agt. HAYMAN COPPERMAN,  
defendant.

*Malicious prosecution—libel—new trial.*

To sustain an action for *malicious prosecution* the gravamen of the charge must be that the plaintiff has been improperly made the subject of legal process to his damage. The form of the prosecution is immaterial, but there must be a legal process of some kind to which the plaintiff was subjected and forced to submit. Where this element is missing, the action must fail.

A mere note or letter of a magistrate or officer requesting a person to call, is not a prosecution.

Where the action was partially tried as one for malicious prosecution, but finally changed and submitted to the jury as an action of *libel*, on the ground that the complaint seemed to contain sufficient averments for that purpose, and the state of the proof seemed to call for such change: *Held*, on a review of the case and authorities upon this motion that this view of the case was erroneous, and the defendant was entitled to a new trial, with leave to plaintiff to amend his complaint.

The true doctrine and principles of libel stated.

*At Special Term.*

MOTION by defendant for a new trial on a case.

*James C. Spencer*, for the motion.

*Samuel Hirsch*, opposed.

FREEDMAN, J.—This action was instituted and attempted to be tried as an action for a malicious prosecution, but was finally submitted to the jury as an action for libel. After a careful re-examination of the evidence and of the rulings

---

Newfield agt. Copperman.

---

made in the course of the trial, I still adhere to the view then expressed, that the action cannot be maintained as one of malicious prosecution. In an action of malicious prosecution the gravamen of the charge is that the plaintiff has improperly been made the subject of legal process to his damage. The form of the prosecution is immaterial, nor is it material that the plaintiff was prosecuted by an insufficient process or before a court not having jurisdiction of the matter, for a bad indictment may serve all the purposes of malice as well as a good one (1 *Greenl. on Ev.*, § 449). But there must be a legal process of some kind to which the plaintiff was subjected and forced to submit. This element is entirely missing in the present case. A mere note or letter of a magistrate or officer requesting a person to call, is not a prosecution.

The next question, therefore, is whether the action was properly turned into one for libel. Under the view which was then taken of the law applicable to this case, no opportunity being had to make a critical examination, and the counsel for the respective parties citing no authorities, the complaint seemed to contain sufficient averments for that purpose, and the state of the proof seemed to call for the change; and if such view was correct, defendant had no business to be surprised by the ruling which permitted the change. After full consideration of the authorities submitted by the defendant on this motion, however, I have become satisfied that such view was not strictly correct. The true doctrine is, that words spoken or written, in a judicial proceeding, by any person having an interest therein, or a duty to perform therein as witness or counsel, are not only conditionally, but absolutely privileged, and no action will lie therefor, however false, defamatory or malicious they may be, provided they were pertinent and material to the inquiry before the court or officer (*Perkins agt. Mitchell*, 31 *Barb.*, 461; *Marsh agt. Ellsworth*, 2 *Sweeny*, 589; *Same case*, 1 *id.*, 52; *Swydam agt. Moffat*, 1 *Sandf.*, 459; *Warner agt. Paine*, 2 *id.*, 195;



---

Newfield agt. Copperman.

---

*Gilbert* agt. *The People*, 1 *Denio*, 43; *Garr* agt. *Selden*, 4 *N. Y.*, 91). And the term "judicial proceeding," is not to be restricted to trials of civil actions or indictments, but includes every proceeding before a competent court or magistrate in the due course of law or the administration of justice, which is to result in any determination of action of such court or officer (*Perkins* agt. *Mitchell*, *supra*).

That the statements contained in the affidavit sworn to by the defendant before the fire marshal of Brooklyn were pertinent and material to the inquiry instituted by said officer as to the origin of the fire which had destroyed plaintiff's factory, cannot be denied. Aside, therefore, from the question as to the sufficiency of the allegations of the complaint as a complaint for libel, it was not enough to instruct the jury that upon proof to their satisfaction of defendant's malice and of the intentional falsity of his sworn statement, they were at liberty to render a verdict for the plaintiff. If, for the contents of that statement, plaintiff can maintain an action of libel at all, which under the decisions referred to may perhaps be considered to be still an open question, it is clear that he can only do so upon proof, which takes his case out of the operation of the general doctrine above alluded to. Proof that the defendant maliciously contrived to induce the fire marshal to institute the inquiry and to subpoena him, the defendant, and that the defendant thus expressly manufactured the occasion, on which he bore false witness against the plaintiff, may perhaps have that effect. But without expressly deciding the point, it is sufficient for the purposes of this motion to say, that the case was not submitted to the jury upon this theory, but upon another and insufficient theory.

The motion for a new trial must be granted, with costs to defendant to abide the event, and plaintiff may have leave to amend his complaint, if he should be so advised. Order to be settled upon a notice of at least two days.

---

Blott agt. Rider.

---

## SUPREME COURT.

JONATHAN BLOTT, Jr., agt. HARRIET A. RIDER, otherwise  
called HARRIET A. BLOTT.

*Dissolution of marriage contract — judgment — irregularity.*

A judgment declaring void the *marriage contract* between the parties, entered *ex parte* by the plaintiff on a referee's report, *without application to the court, is irregular.*

The Code has not attempted either to enlarge or diminish the jurisdiction of this court in divorce as to cases in which it may proceed, or as to the evidence upon which a divorce may be decreed. On the contrary, the former jurisdiction is continued as it was vested when the Code was enacted.

*Niagara Special Term, Lockport, July 21, 1873.*

MOTION by defendant to set aside the judgment declaring void the marriage contract between the parties, entered *ex parte* by the plaintiff on the referee's report, without application to the court, on the ground of irregularity.

*D. Millar*, for motion.

*John H. White*, opposed.

LAMONT, J.—No judgment for a divorce, whether after the trial of an issue, or otherwise, can be entered except upon the special direction of the court (*Rule 92*). A judgment declaring void the marriage contract by a sentence of nullity operates by judicial act to separate married persons, and is a divorce, as much so, as a judgment dissolving it. The rule

---

Blott agt. Rider.

---

embraces all divorce causes, and is coextensive with the statutes upon the subject. The suggestion that this rule is null and void, as being contrary to the provisions of the Code, cannot be adopted. Actions for divorce, for special reasons and by force of certain statutes relating to such suits alone, must continue to be, as they always have been, treated as exceptional, in so far as such particular statutory provisions have made them so. Judgment by default, on demurrer, by a written offer and acceptance, when the material allegations of the complaint are not controverted by the answer, or where a sham, false or frivolous answer is stricken out, may be entered in the manner specified in the Code, in ordinary actions between party and party, without proof of the whole case; but this practice has never been allowed in actions for divorce. The reason is obvious. The court has no authority in matters of divorce, beyond what is written in the statute. The cases in which, and the proofs upon which, divorces may be decreed are therein expressed (*Peugnet agt. Phelps*, 48 *Barb.*, 566; *Palmer agt. Palmer*, 1 *Paige*, 376). The jurisdiction thus granted is forbidden to be exercised on mere consent of parties, and the court is enjoined from granting a divorce without satisfactory evidence of the facts (2 *R. S.*, 144, § 36, 145, §§ 40, 41). The court is bound as well by the provisions relating to the character of the proof, as by the limitation to the enumerated cases over which jurisdiction is given. The court has no general jurisdiction over the subject matter, such as it exercises over ordinary subjects of litigation. Independently of the statute it has no jurisdiction whatever. The jurisdiction is taken subject to and limited by all the restrictions found in the statute.

The policy of the statute is founded in the broad distinction between divorce causes and all other subjects of mere private litigation. Society is interested in contracts of marriage, both before and after they are consummated (*Thorne agt. Knapp*, 42 *N. Y. R.*, 477). It is an inseparable incident, in our civilization, to the *status* of marriage, that it cannot



---

Blott agt. Rider.

---

be dissolved at the will of the parties. It is not a contract, in the full common-law sense of the term, but a civil institution established for great public objects (*White agt. White*, 5 *Barb.*, 479, 480). A late writer says, not only the parties, but the public have an interest in marriage, and its dissolution, and growing out of this twofold relation we have the doctrine running through all the matrimonial suits, and bringing into subserviency all other laws on the subject, that the proceeding—though upon its face a controversy between the parties of record only—is, in fact, a triangular suit, *svi generis*, the government or public occupying the position of a third party without counsel, it being the duty of the court to protect its interests. From these principles it follows that no decree of nullity, or of divorce from bed and board, or from the bonds of matrimony, can be entered by the court upon the mere consent of the parties of record; because they cannot bind the public. There must be a complaint in due form for a cause authorized by law, sustained by due proof. A default does not, as in other suits, supersede the necessity of proof, or lighten the burden of the plaintiff in establishing the allegations (2 *Bishop on Marriage and Divorce*, §§ 230, 235, [2d ed.]). It would be aiming a deadly blow at public morals to decree a dissolution of the marriage contract because the parties requested it (*Palmer agt. Palmer*, 1 *Paige*, 277; *Montgomery agt. Montgomery*, 3 *Barb Ch. R.*, 134; *Price agt. Price*, 9 *Abb. [N. S.]*, 291).

Satisfactory proof is required in all cases, not in favor of the party who makes default, or confesses the action, but to satisfy the conscience of the court that there is no collusion between the parties, and that there is legal cause for divorce (*Perry agt. Perry*, 2 *Barb. Ch. R.*, 288; *Dodge agt. Dodge*, 7 *Paige*, 590; *Pugsley agt. Pugsley*, 9 *Paige*, 590; *Myers agt. Myers*, 41 *Barb*, 114; 2 *Bishop, supra*, § 236). The Code has not attempted either to enlarge or diminish the jurisdiction of this court in divorce, as to cases in which it may proceed, or as to the evidence upon which a divorce may be

---

Blott agt. Rider.

---

decreed. On the contrary, the former jurisdiction is continued, as it was vested when the Code was enacted (§ 10). Where the statute concerning divorces requires a certain particularity of statement in a pleading, that was held to be a material matter, and the omission to render the pleading demurable, although the Code practice would be, by motion, to compel it to be made definite and certain by amendment (*Walker agt. Walker*, 32 *Barb.*, 205). From the nature of the public interest in the marriage contract and its dissolution, justice would fail and society suffer, unless the statutes upon the subject should be rigidly enforced.

The court, then, is the official guardian of the public interests, with a duty pointed out by the statute.

The injunction that no divorce shall be granted without satisfactory proof, that is, proof satisfactory to the conscience of the court, imposes the duty of passing upon the evidence of the facts, and is inconsistent with the right of a party to enter judgment without an examination by the court, and without the direction of the court. The court must see that this third party—the public—is not prejudiced by the collusion of the parties or the want of proof. What has been so often repeated in the decisions of the court is apparent, that the ends of justice would be subverted by leaving the control of divorce suits to the parties of record, who may have designs inimical to the public good. A public policy, plainly written in the statutes referred to, takes this class of suits out of the ordinary course, so far as may be necessary to attain the ends of justice; and in such case I think the Code, in terms, admits the exception where it says, if a case shall arise in which an action for the enforcement or protection of a right, or the redress or prevention of a wrong, cannot be had under this act, the practice heretofore in use may be adopted so far as may be necessary to prevent a failure of justice (§ 468). The court must determine in what cases, and to what extent, it is necessary to depart from the ordinary Code practice. The rule of the court forbidding the entry of a judgment in

---

Blott agt. Rider.

---

divorce cases, except upon the special direction of the court, and the several other rules regulating the practice in divorce, are tantamount to a declaration by all the judges that the course so directed is necessary to prevent a failure of justice. Although an issue of fact in an action for divorce be tried by referees, their report is not sufficient authority for an entry of judgment of course and *ex parte*.

The report should be brought before the court, together with the evidence. In this way, only, can the court discharge its duty to see that the provisions of the statute are complied with, which prohibit the court even to give a judgment for divorce without satisfactory evidence of the existence of the facts. The cases of *Waterman* agt. *Waterman* (37 *How.*, 36, 37, 43, 44); *Linden* agt. *Linden* (36 *Barb.*, 61) are good examples.

The propriety of rule 92 is illustrated in the present case, where judgment has been entered, without the direction of the court, upon the referee's report, which does not find sufficient facts to authorize a judgment of nullity. It should have been found as a fact, to justify the judgment, that defendant's former marriage was in force when she married the plaintiff. This is jurisdictional (2 *R. S.*, 142, § 20, *subd.* 2; *Linden* agt. *Linden*, *supra*). I say nothing as to the evidence necessary to warrant such finding (*Valleau* agt. *Valleau*, 6 *Paige*, 208). But without such fact being found the case is not established.

Again, the judgment of nullity may, in certain cases, declare the marriage void, *ab initio*. In other cases the marriage is only voidable, and does not become void until sentence of nullity is passed upon it. When the judgment declares that the second marriage was void, that is, void at all times, there should be a finding of facts warranting that form of judgment (2 *R. S.*, 139, §§ 6, 23, 142; *Valleau* agt. *Valleau*, *supra*; *Grapsey* agt. *McKinney*, 30 *Barb.*, 47). These are not technical objections, but matters of substance,



---

Blott agt. Rider.

---

which the court, in this class of actions, is bound to notice, although counsel does not point them out.

From the fact that the court must finally determine the case, it follows that a defendant who has appeared in the action is entitled to notice of the application for judgment, and has a right to be heard upon the final disposition of the cause.

The motion to set aside the judgment for irregularity is granted, with ten dollars costs.

This order was affirmed at general term (fourth department) on the above opinion.

---

Sanford agt. White.

---

### SUPREME COURT.

LAURA A. SANFORD and others agt. LAVINIA S. WHITE and others.

THE opinion at general term in this case, INGRAHAM, P. J., involving the question of the regularity of service of process upon unknown owners in *partition* cases, is reported in 46 *How. Pr. R.*, 205. An appeal was taken to the court of appeals and the decision was affirmed, with costs, in April, 1874.

---

Krom agt. Levy.

---

## SUPREME COURT.

STEPHEN KROM, Survivor of JOHN A. SCHENCK, respondent,  
agt. JOHN J. LEVY, appellant.

*Book of account received in evidence—after the decease of the one who kept it—special agreement—defective work—delivered and retained.*

Where a surviving partner, plaintiff, introduced a *book of account* as evidence of work done and materials furnished for the defendant, kept by his deceased copartner, and the testimony of the plaintiff showed that at the time the entries were made, he knew them to be correct; that he kept all the memoranda from which the entries were transcribed; that they were usually on a slate kept for that purpose, and transcribed from that into the book by his deceased partner, sometimes every day and sometimes at intervals of two or three days; that witness generally assisted, reading therefrom from the slate—the items themselves being taken orally from the workmen and some from himself; that he saw most of the entries at the time they were made, or very soon after, and that he believed the book produced to be the original, and that the firm did work for the defendant:

*Held*, that this evidence was sufficient to allow the book to be received as evidence in the case, and the plaintiff might properly read therefrom to supply the dates and amounts of the several items which could not be otherwise given.

Where a special agreement was made between the defendant and the firm for repairing two card-cutters and grinding and putting a third in order, and the work appeared to have been performed and the card-cutters returned to and retained by the defendant, but the material used in repairing and completing the two was either not good or improperly tempered, and for that reason the defendant resisted the plaintiff's demand for the price agreed to be paid for the work and material used:

*Held*, that this he could not do after receiving and retaining what had been done. It was such a performance as entitled the plaintiff to recover the price agreed to be paid, subject to the defendant's right to reduce it by way of recoupment or counter-claim on account of the defective manner in which the work was done. But this defense was not set forth in the defendant's answer, and for that reason it could not have been properly



---

Krom agt. Levy.

---

allowed by the referee, even though it appeared in his evidence given on the trial.

*First Department, General Term, March, 1874.*

NOAH DAVIS, *presiding*, WESTBROOK and DANIELS, *JJ.*

THIS action was brought to recover a balance of account for work done and materials furnished by the plaintiff and John A. Schenck, as partners, for the defendant. The referee reported \$63.23, and interest on the same from the 8th day of June, 1864, to be due to the surviving plaintiff. From the judgment entered on the report the defendant appealed.

*N. B. Howie*, for appellant.

The summons and complaint served on defendant June 8, 1864; answer served June 28, 1864; order of reference to D. T. Walden, Esq., entered November 15, 1864. Cause tried before referee. Judgment entered in favor of defendant against plaintiff, for \$174.02, March 31, 1865. Notice of appeal to general term served April 27, 1865; judgment affirmed May 16, 1867; judgment of affirmance entered May 22, 1867. Notice of appeal to court of appeals served June 13, 1867. Judgment reversed by commission of appeals January, 1872. Order referring issues to Edward S. Dakin, Esq., entered May 15, 1872. Cause tried before referee. Judgment entered in favor of plaintiff against defendant, on referee's report, for \$840.39, October 26, 1872. Notice of appeal served November 2, 1872. Case settled February 12, 1873. The complaint alleges that on December 1, 1862, defendant was indebted to plaintiff in \$255.99, balance due for work, labor and services furnished by plaintiff to defendant between May 9, 1862, and December 1, 1862. The answer denies all the allegations of the complaint, and alleges that the plaintiff Krom has no interest in the claim and that the plaintiff Schenck is the only party interested therein;

---

Krom agt. Levy.

---

that in November, 1862, a contract was made between Schenck and defendant that Schenck should plane and cut a back form upon a brass casting to be furnished by defendant, and to complete the same within three days, for fifteen dollars; that defendant procured the casting and delivered it to Schenck; that Schenck neglected and refused to so plane and cut the said back form, and in consequence thereof the defendant sustained loss and damage to the sum of \$250, and counter-claims the same. Upon the trial, it was stipulated between counsel that the counter-claim, set up in the answer, be considered as a counter-claim against the plaintiffs, who are deemed as denying it by a reply.

*Facts.*—The plaintiff, Schenck, had for many years prior to this action, in his individual name and on his sole account, dealt with defendant, making and repairing machinery. In April, 1862, the plaintiff, Krom, became a partner with Schenck, and so continued until December, 1862. Defendant had no notice or knowledge whatever of the partnership. He never knew Krom other than as a workman in Schenck's shop. Sometime prior to August, 1862, the plaintiff contracted with defendant to repair two card-cutting machines of defendant's, by making new cutters, set of springs, cross-bar, set screws, and to return said machines to the defendant perfect and complete, for the sum of \$300; and said machines were sent to plaintiff's shop for that purpose. The charge of \$310, under August 13, 1862, in plaintiff's bill of particulars, is for such contract to repair said two card-cutting machines. The new cutters put into said machines by said plaintiffs were improperly tempered, or the material of which they were made was not good. Said two machines were returned by plaintiffs to defendant about the thirteenth of August, imperfect and incomplete, and the plaintiffs did not perform their contract to repair them. Some time in June or July, 1862, the plaintiffs contracted with the defendant to grind up and put in order another card-cutting machine for defendant for the sum of forty dollars, and said machine was sent to

---

Krom agt. Levy.

---

plaintiff's shop for that purpose. The charge of forty dollars under date of August 23, 1862, in plaintiffs' bill is for such contract. Said machine was returned by plaintiffs to defendant about August 23, 1862, imperfect and incomplete, and plaintiffs did not perform their contract to repair it. All of said machines were unfit for the purpose for which they were constructed, owing to the failure of plaintiffs to repair them as and in the manner they agreed to. Defendant employed one Catlin to do the work plaintiffs left undone, or had done improperly, to and upon said card-cutting machines, and defendant necessarily expended on such work \$227.20. In October, 1862, plaintiffs contracted to plane and cut for defendant a "plaid form," on a brass casting provided by him, for fifteen dollars. Defendant paid forty-five dollars and eighty cents for such pattern of such plaid form. Plaintiffs began the work but soon abandoned it, returning the casting to defendant, and never performed their contract to plane and cut it. When returned, the casting had been planed too low, or too thin, to be useful for any purpose, save as old metal, for which it was sold at the highest price it would bring, fifteen dollars; and the pattern for it had become useless to defendant. The work on the casting contracted to be done by plaintiffs would have cost the defendant \$150. A new casting would have cost the defendant \$45.80, at the time the plaintiffs returned the old one.

I. The contracts were entire, and full performance of them was a condition precedent to any recovery by plaintiffs of the price agreed upon for the repairs (*Smith agt. Brady*, 17 *N. Y. R.*, 173; *Harmony agt. Bingham*, 12 *id.*, 99; *Jenkins agt. Wheeler*, 3 *Keyes*, 645 [652]; *Brown agt. Weber*, 38 *N. Y. R.*, 187). A refusal to find a material fact, supported by evidence, is error in law (*Beck agt. Sheldon*, 48 *N. Y. R.*, 365).

II. When a right of action has once accrued, it can only be discharged by a release or the receipt of something in satisfaction (*McKnight agt. Dunlop*, 5 *N. Y. R.*, 537; *Christianson agt. Lainford*, 19 *Abb.*, 221). No rule or principle



---

Krom agt. Levy.

---

of law required defendant to inform plaintiffs of his intention to hold them to their contract (*Pike agt. Butler*, 4 *N. Y. R.*, 360). Where illegal evidence is admitted, which bears in the least degree on the result, it is fatal (*Baird agt. Gillett*, 47 *N. Y. R.*, 186; *Worrall agt. Parmelee*, 1 *id.*, 519; *Wilson agt. Wilson*, 4 *Keyes*, 413). To make books of account competent evidence, see *Greenl. Ev.*, vol. 1, § 117 and notes; *Id.*, 117, note 2; *Phil. on Ev.*, vol. 1, 5 *Am. ed.*, p. 310, note 3.

*Coles Morris* and *Michael H. Cardozo*, for respondent.

I. The facts in the case fully sustain the rulings of the referee admitting in evidence the entries in the plaintiff's book of accounts, and call for the application of the rule that entries and memoranda, made in the usual course of business, by clerks and other persons, may be received in evidence after the death of the person who made them (*Merrill agt. Ithaca & Owego Railroad Co.*, 16 *Wend.*, p. 594, opinion of COWEN, J., in which all the cases are reviewed; *Davidson agt. Powell*, 16 *How. Pr. R.*, 467; *Smith agt. Sanford*, 12 *Pick.*, 139; *Ingraham agt. Bockens*, 9 *Serg. & Rawle*, 285; *Stroud agt. Tilton*, 2 *Keyes' R.*, 140).

II. The referee's decision upon the conflict of evidence in the case will not be disturbed by this court (*Howell agt. Biddleton*, 62 *Barb.*, 131; *Baker agt. Spencer*, 58 *id.*, 248; *Matthews agt. Coe*, 56 *id.*, 430).

III. This case has been twice tried by different referees; there are no errors of law to be corrected; the exceptions upon which the defendant relies on this appeal being wholly to findings of fact, as to which the evidence is, at least, conflicting.

Under these circumstances a third trial should not be granted, even if the court should be of opinion that the report of the referee is against the weight of evidence (*Talcott agt. Commercial Ins. Co.*, 2 *Johns. R.*, 467; *Fowler agt. Aetna Fire Insurance Co.*, 7 *Wend.*, 270).

---

Krom agt. Levy.

---

DANIELS, J.—The plaintiffs' demand was proven in part by his own evidence accompanying the book of account kept by his deceased copartner. He was asked what he knew about the entries in the book, and the defendant objected to the inquiry as irrelevant and incompetent, because it appeared that his copartner kept the book exclusively, and the knowledge of the witness must necessarily be secondary evidence, and he should be confined to his knowledge of work done for the defendant. These objections were very properly overruled, because the witness' question merely required the witness to state what knowledge he had concerning the entries, and his answer clearly showed the propriety of the inquiry, for he merely said that at the time they were made he knew them to be correct. The exception taken to this ruling of the referee has no colorable support to sustain it.

Upon his cross-examination this witness stated that he kept all the memoranda from which the entries were transcribed; that they were usually on a slate, kept for that purpose, and transcribed from that into the book by Mr. Schenck, sometimes every day and sometimes at intervals of two or three days, and that he generally assisted, reading from the slate. The items themselves, he stated, were taken orally from the workmen and some from himself. These memoranda were of work done by himself and the other workmen, and all the work they and he did. He stated further that he saw most of the entries at the time they were made or very soon after, and that he believed the book produced to be the original. It also appears that the firm did work for the defendant. This evidence was sufficient to allow the book to be received as evidence in the case (*Sickles* agt. *Mather*, 20 *Wend.*, 72, 75-77; *Merrill* agt. *Ithaca & Owego Railroad Co.*, 16 *id.*, 586).

After it was given, and before the book was received, the witness stated he could of his own knowledge relate what the first work was which was done by the plaintiffs for the defendant; and as he was about to read from the book the

---

Krom agt. Levy.

---

defendant objected that the entries in the book were not evidence, for the reason that Schenk was the proper person to prove them, and that the evidence of the witness reading from the book was secondary and incompetent. These objections were overruled and the defendant excepted. The witness was then about proceeding with the reading of the entries, when it was agreed he could use the bill of particulars instead of the book, and he did so. But before reading from it he stated that he could testify of his own knowledge of the accuracy of every item in the bill as to prices, and he knew they were reasonable, and added further that the work and materials mentioned in the bill was done and furnished by the plaintiffs for defendant, all between May 10 and October 26, 1862, but he could not give the dates without looking at the book, and then read from the bill of particulars. As the items were authenticated by the evidence which the witness gave, there was no impropriety in allowing him to read them for the purpose of supplying the dates and amounts, which could not be otherwise given (1 *Greenl. Ev.*, § 436). In the case of *Russell agt. Hudson River Railroad Co.* (17 *N. Y. R.*, 134) it was held that memoranda might be so used by a witness when it appeared to have been made at or about the time of the transaction to which it relates; that its accuracy is duly certified by the oath of the witness, and that there is necessity for its introduction on account of the inability of the witness to recollect the facts (*Id.*, 140). Within these authorities it was entirely proper to allow the witness to read from the bill, as that was substituted by consent for the book, for the purpose of supplying the dates and amounts, which could not otherwise have been obtained (*McCormick agt. Penn. Central Railroad Co.*, 49 *N. Y.*, 304, 315). After this evidence was taken, the book was received in evidence at the request of the referee and without objection. When the plaintiff rested, the defendant moved to have the evidence given by him stricken out, so far as it appeared to be based upon entries in the book. This was



---

Krom agt. Levy.

---

refused, and an exception taken by the defendant. This was too general to render it practicable; but as the book was so far authenticated by the oath of the witness as to render it evidence in the case upon matters entered upon it and not within his recollection, he had the right to that extent to base his evidence upon it. This evidence, so far, was merely a repetition of the contents of the book, dependent entirely upon the entries made for its weight and effect.

Besides that, the examination of the defendant as a witness showed that there was no substantial controversy concerning the amount of work done and materials supplied; for he did not appear to claim that the charges were unfounded or excessive, but simply that many of the items charged in the account appertained to and were included within special agreements made for particular jobs of work between himself and the deceased copartner. The referee was not in error for refusing to strike out the evidence of the witness, nor in permitting him to refer to the entries, in the course of his evidence, for their dates, amounts and such other particulars as it would be impracticable for him to give from memory.

Special agreements were made between the defendant and the firm for repairing two card-cutters and grinding and putting a third in order. The work stipulated for appears to have been performed and the card-cutters returned to and retained by the defendant; but the material used in repairing and completing the two was either not good or improperly tempered. For that reason the defendant resisted the plaintiff's demand for the price agreed to be paid for the work and material used. This he could not do after receiving and retaining what had been done. He acted voluntarily in doing that, and for that reason could not successfully resist the claim made for a recovery of the price, so far as the labor and material should prove to be beneficial to him. The law only allows a party to retain, without compensation, the benefits of a partial performance, when from the nature of the contract he must receive such benefits in advance of a full

---

Krom agt. Levy.

---

performance, and by its terms or just construction he is under no legal obligation to pay until the performance is complete (*Smith agt. Brady*, 17 *N. Y. R.*, 173, 187). The authorities cited and relied on by the defendant in which it was held that a recovery could not be had by the party partially performing an entire agreement, are all within this principle, and for that reason not applicable to the point made by way of defense to the charges for the work and materials upon the card-cutters. The plaintiff and his partner performed all the work and supplied all the material which the performance of their agreement as to card-cutters required, and after that was done they were received and retained by the defendant. That was such a performance as entitled the plaintiff to recover the price agreed to be paid, subject of course to the defendant's right to reduce it by way of recoupment or counter-claim, on account of the defective manner in which the work was done (2 *Parsons on Cont.*, 2d ed., 246, 247; *Leavenworth agt. Packer*, 52 *Barb.*, 132; *Neaffie*, 4 *Lans.*, 4; *Miller agt. Eno*, 14 *N. Y. R.*, 397; *Norris agt. La Farge*, 3 *E. D. S.*, 375; *Harris agt. Bernard*, 4 *id.*, 195; *McKnight agt. Devlin*, 52 *N. Y.*, 399).

But that defense was not set forth in the defendant's answer, and for that reason it could not have been properly allowed by the referee, even though it appeared in his evidence given upon the trial. No reason for the rejection of this claim appears by the conclusions of the referee, unless it may be that it was not satisfactorily established. But the condition of the pleadings was sufficient to justify the action of the referee in disallowing it. As they are contained in the case he could not lawfully have made any deduction from the plaintiff's account by reason of this demand (*McKyring agt. Bull*, 16 *N. Y. R.*, 297; *Brazil agt. Isham*, 2 *Kern.*, 9). This is a defect which cannot be disregarded or supplied for the purpose of reversing this judgment. The defendant had his election to set this claim up by way of defense or reserve it for an independent action in his own behalf (*Gil-*

---

Krom agt. Levy.

---

*lespie* agt. *Torrance*, 25 *N. Y. R.*, 306, 309, 311). By omitting to allege it in his answer he must be presumed to have elected not to rely on it as a defense to the claim made by the plaintiff for the work done upon the card-cutters.

As this defense was not involved in the action, it is unnecessary to examine the defendant's exception to the evidence given showing that the defendant made no claim that the work done or materials furnished for the card-cutters was in any respect defective. At the same time no reason exists for doubting its propriety, since it would have a slight tendency, certainly, to show that both had proved satisfactory.

The breach of the contract made by the plaintiff and his partner for planing and cutting the back form was set forth in the answer, and the defendant was allowed \$125 by way of damages for its non-performance. It was claimed that a further allowance should have been made for the difference in the value of the form and the price for which it would sell as old metal. This claim was made upon the ground that it had been rendered useless by the work performed on it. The only evidence supporting that position was that which the defendant himself gave as a witness; while that of Hookey and Tucker, who were produced as witnesses on his behalf, failed to sustain him in this respect; they described it as a casting on which work had been done, but not in such a manner as to injure it. The evidence they gave fully justified the referee in his conclusion on this subject.

But one of these witnesses, who seems to have been fully competent to form an accurate judgment as to the expense of performing the agreement made, testified that it would cost \$150 to do the work upon it which the plaintiff and his partner undertook to perform, and that ten or fifteen dollars' worth of the work only had been done upon it. That does not appear to have been allowed to the plaintiff, and cannot be said to be included in the bill of particulars. The defendant has, consequently, derived that amount of benefit from the partial performance shown, without cost or expense on



---

Krom agt. Levy.

---

his part. To complete the work contracted for required an expenditure of \$135 or \$140, and that included the contract price of fifteen dollars which defendant agreed to pay the plaintiff and his partner for it. As that was not paid by the defendant, but would have been deducted from the damages arising out of their failure to perform, and that deduction will reduce the damages to the amount allowed by the referee, it placed the defendant precisely where he would have been if the agreement had been performed as it should have been.

No reason can be found for doubting the legality of the conclusions stated by the referee. The judgment, therefore, should be affirmed, with costs.

DAVIS, P. J., concurred.

---

First National Bank of Troy agt. Cooper.

---

## SUPREME COURT OF THE UNITED STATES.

THE FIRST NATIONAL BANK OF TROY, appellant, agt. MARVILLE W. COOPER, WALTER VAIL, WILLIAM B. S. GAY AND CHARLES T. RANDALL, formerly Partners composing the firm of COOPER, VAIL & Co., and SHEPARD TAPPIN, Assignee of the TROY WOOLEN COMPANY.

*Bankrupt act — bill filed under section 2 — discretionary power of circuit court — jurisdiction — review of.*

Where a bill is filed in the circuit court by a contesting creditor, under section 2 of the bankrupt act, to *review* a decision of the district court refusing to expunge a debt under section 22, the circuit court, under its *discretionary power*, may refuse to hear the case upon the merits.

If the bill is filed with a double aspect, the circuit court has no jurisdiction to hear it as an *original* bill, although it is alleged in the bill that the creditor had no debt, and the assignee knew that fact, but neglected to appeal from the decision of the district court allowing such alleged debt. To sustain such bill it is necessary to allege fraud and collusion between the assignee and the creditor. *Negligence*, on the part of the assignee, is not sufficient.

*October Term, 1873.*

APPEAL from the circuit court of the United States for the northern district of New York.

*E. F. Bullard*, counsel for appellant.

The defendants, Cooper & Co., demur, and claim that the circuit court has no jurisdiction.

The bill was filed with a double aspect:

1st. As an original bill.

2d. To review under section 2.

---

First National Bank of Troy agt. Cooper.

---

*First.* The circuit court has full *original* jurisdiction under subdivision 3 of section 2, bankrupt law.

(a) The order of district court allowing the debt gives Cooper & Co. an adverse interest touching the property of the bankrupt.

It is an apparent lien upon the estate.

*Second.* The circuit court being a court of equity, with *general jurisdiction*, it has power to set aside said debt, and also the order of the district court, without invoking the special jurisdiction under section 2 of bankrupt law (*Dobson* agt. *Pearse*, 12 *N. Y.*, 156; *see cases cited*, pages 162 to 164; *In re Richardson*, 2 *N. B. Register*, 74; *approved*, *Jobbins* agt. *Montague*, 6 *id.*, 517).

*Third.* "The court of chancery has inherent jurisdiction in matters of trust and confidence" (*Tiffany & B. on Trusts*, 377).

(a) Equity will interpose to prevent a failure of justice and compel a performance of a trust (2 *Story Eq. Jur.*, § 961).

(b) Courts of equity have power to remove a trustee, independent of any statute (*People* agt. *Norton*, 9 *N. Y.*, 178; *Leggett* agt. *Hunter*, 19 *N. Y.*, 445).

(c) "Circuit courts have same power to grant relief under state laws as under those of the United States when the proper parties are before them" (*Boyce*, 30, *citing* 6 *McLean*, 395).

*Fourth.* Circuit courts have *general jurisdiction in equity* under the constitution, independent of any statute.

Article 3, section 2, provides that the *judicial power* shall extend to all cases in *law and equity* under the constitution and laws of the United States, &c.

In bankrupt cases the supreme court has *appellate* jurisdiction under same section.

Section 1 provides that "the *judicial power* shall be vested in one supreme court, and in such inferior courts as congress may establish."

As congress has established but two inferior courts (circuit



---

First National Bank of Troy agt. Cooper.

---

and district), one or both of them must be vested with this power in law and equity under section 2 of the constitution, otherwise no court is provided in which it does exist, as the supreme court can only have *appellate* jurisdiction.

We submit that the moment congress established the circuit court that moment jurisdiction became vested in it by force of the constitution.

The bankrupt court is a special creature of the statute (*Clark agt. Binninger*, 3 B. R., 129).

*Fifth.* This court has full jurisdiction, under subdivision 1 of section 2 of the bankrupt law, to review and correct the error of the district court.

(a) Because such power is expressly given by that section (*Sweat agt. R. R. Co.*, 5 B. R., 234; *In re Alexander*, 3 B. R., 6).

(b) Because no appeal was taken under section 8 by the negligence or fraud of the assignee (*Bate agt. Graham*, 11 N. Y., 237; *Hagan agt. Walker*, 14 Howard, 29).

*Sixth.* We submit, also, that this court has the right on this appeal to reverse the decree below and remit the case to be tried upon its merits.

In *Morgan agt. Thornhill* the circuit court did hear and decide the case upon the merits, and, therefore, no error was committed; and hence this court could not reverse.

That review was also upon *petition* and not by *bill*, as in the case at bar (*Mead agt. Thompson*, 15 Wallace, 635; *Insurance Co. agt. Comstock*, 16 Wallace, 258, *were of the same character*).

What was said by the court in those three cases would not apply to the case at bar, because it is a regular suit.

In *Marshall agt. Knox* (16 Wallace, at page 555), Mr. justice BRADLEY says:

"But, regarded as a bill of review, we could not, according to our own decision in *Morgan agt. Thornhill*, entertain an appeal from the decision of the circuit court in the case."

This is a regular suit, and, therefore, an appeal does lie

---

First National Bank of Troy agt. Cooper.

---

under section 9 of the bankrupt act, and also under the judiciary act.

The fact that the circuit court did not pass upon the *merits* of the case is a reason why this court cannot make a *final* decree, but it is no reason why the erroneous decree below should not be reversed.

The defendants are not allowed to say that they have procured an erroneous decree as a reason to prevent its reversal (*The People* agt. *N. Y. C. R. R. Co.*, 29 *N. Y.*, 418).

*By the Court*, STRONG, J.—The demurrer presents the question whether the complainant's bill sets forth any equity sufficient to justify the court in granting the relief sought against the defendants. The object of the bill is to procure a reversal of an order of the district court made under the following circumstances: On the 4th day of February, 1870, the Troy Woolen Company was adjudged a bankrupt by that court, and on the 11th of March, 1870, Shepard Tappin, one of the defendants, became the assignee. Soon after, the other defendants, Cooper, Vail & Co., proved a debt against the bankrupt amounting to \$67,029.81, and on the 24th day of July, 1870, they filed the probate with the assignee. Subsequently, on the 29th of November next following, on petition of the appellants, who had also proved a debt against the bankrupt, the district court made an order allowing them and the assignee to contest the validity of the claim of Cooper, Vail & Co. It was then referred to Worthington Frothingham, Esq., to take the proofs and accounts respecting the claim, to determine its legality and amount, and to report his conclusions to the court. Permission was also given to the assignee, and to any creditor of the bankrupt, if they desired to contest the claim, to attend the proceedings before the referee; and it appears that the complainants did attend, that evidence in opposition to the claim was submitted, and that the referee reported the whole of it as due from the bankrupt. To his report joint exceptions were filed on behalf of

---

First National Bank of Troy agt. Cooper.

---

the complainants and the assignee, and argued in the district court upon the evidence taken before the referee. These exceptions were overruled, and on the 13th of July, 1871, the court made an order allowing the debt as proved by Cooper, Vail & Co., and directing the complainants to pay the costs and expenses of the reference. The bill, after setting forth these facts, makes a general averment that Cooper, Vail & Co. have no legal claim against the bankrupt; that they have fraudulently proved their claim; that they knew this when the exceptions were taken to the referee's report as well as when the court made the decree allowing the debt, and that it was thus proved before the district court. The complainants then aver that the decree was erroneous, because there was no legal debt due by the bankrupt to Cooper, Vail & Co.; because the evidence before the court proved that there was no such debt, and because the court should have disallowed it.

This is one aspect of the bill. The complainants, however, further charge that the assets in the hands of Cooper, Vail & Co. are insufficient to pay fifty cents on the dollar of the legal debts of the bankrupt, even if the claim of Cooper, Vail & Co. be disallowed; and they aver that the assignee refused to appeal from the decision of the district court, or to allow the creditors to appeal in his name, stating that he was advised the complainant had a right to have the decree reviewed under section 2 of the bankrupt act, and that if the creditors desired a review they must take that course. They then charge that the assignee was guilty of neglect of duty in omitting to appeal from the decree of the district court, and they renew the averment that the bankrupt is not, and never was, liable for the debt proved against him by Cooper, Vail & Co., or for any part of it. It is upon these facts they base the prayer of the bill, which is that the decree made by the district court may be "reviewed, examined, revised and annulled, and that the proof of debt filed with



---

First National Bank of Troy agt. Cooper.

---

the assignee by Cooper, Vail & Co. may be rejected and expunged."

No doubt, when an executor or administrator colludes with a fraudulent claimant against a decedent's estate, and refuses to take steps to resist the claim, any person interested in the estate may maintain an action against such fraudulent claimant and the executor or administrator for the purpose of contesting the claim. Bills in equity of this nature have been maintained. And if an assignee in bankruptcy, with knowledge, or with reason to believe, that one claiming to be a creditor of the bankrupt had proved a debt against the bankrupt's estate which had no existence, or which was tainted with fraud, should neglect or refuse to contest the allowance of such debt, there is no reason why the other creditors, having proved their debts, should not be permitted to interpose and seek the aid of a court of equity to annul the allowance. But the bill before us presents no such case. The assignee has resisted the allowance of the debt claimed by Cooper, Vail & Co.; he took part with the appellants in contesting the debt before the referee to whose consideration it was submitted. He joined with them in filing exceptions to the report allowing the claim. There is no averment of any collusion between him and the claimants. The bill exhibits nothing which ought to cast discredit upon his fidelity to his trust. The referee decided against the appellants after hearing all the evidence they had to submit. The district court reviewed his decision upon exceptions taken to it, and came to the same conclusion, allowing the debt claimed by Cooper, Vail & Co. Nor is it pretended that any new evidence exists which ought to lead the circuit court to any other conclusion than that at which the district court arrived. In such a state of facts it cannot be maintained that it was the duty of the assignee to enter an appeal to the circuit court or even to allow an appeal in his name. After two trials, in which he was aided by the appellants, after all the evidence had been made use of in opposition to the claim which could

---

First National Bank of Troy agt. Cooper.

---

then be produced, or which can now be obtained, and after two decisions allowing the claim, he may well have concluded, as he did, that his duty to his trust did not require either expenditure of the bankrupt's estate in further litigation, or the delay which might have been consequent upon an appeal. The bill, then, wholly fails in exhibiting any equity against the assignee.

It is equally without equity as against Cooper, Vail & Co. It is true the averment is made that they have no legal or valid claim against the bankrupt, and that their claim was fraudulently proved and made, but there is no allegation wherein the fraud consists, or of any step they have taken in the assertion of their claim which they might not lawfully take. Such a general averment of fraud can be no foundation for an equity. Moreover, it is apparent that the only fraud intended in the averments of the bill is the assertion of a claim which the complainants insist is not sufficiently sustained by evidence. They objected to the claim at the outset. They appealed to the district court, and they were allowed to contest its validity. It was at their instance a referee was appointed to examine and report upon it; before that referee they went to trial, without objection. When defeated they brought the contest into court and renewed it there, but unsuccessfully. And they do not now allege that in either of these trials there was anything unfair, or that Cooper, Vail & Co. were guilty of any fraud in maintaining their claim; other than the assertion of its existence, or that they themselves made any mistake, or that they have any other case now than they had urged before the referee and the district court. Their only ground of complaint is that the referee and district court came to a different conclusion from that which they think should have been adopted. The court thought the evidence established the existence of a debt, due Cooper, Vail & Co. They are of a different opinion. They think the evidence did not establish the existence of such a debt, and, therefore, they have filed this bill in the

---

First National Bank of Troy agt. Cooper.

---

circuit court to annul the action of the district court. In effect, they are seeking a new trial of a question of fact which has been decided against them, and this without averring anything more than that the district court drew a wrong conclusion from the evidence. Very plainly, they have made no case for equitable interference. There are some bills in equity which are usually called bills for a new trial; they are sustained when they aver some fact which proves it to be against conscience to execute the judgment obtained; some fact of which the complainant could not have availed himself in the court when the judgment was given against him, if a court of law, or of which he might have availed himself, but was prevented by fraud or accident unmixed with any fault or negligence of his own. But a court of equity will never interfere with a judgment obtained in another court, because it is alleged to have been erroneously given, without more. And such is, substantially, this case.

But though the bill is destitute of equity, when considered as an original bill, it is contended that it may be regarded as an application for the exercise of the supervisory jurisdiction of the circuit court authorized by the second section of the bankrupt act. That section declares that "the several circuit courts of the United States, within and for the districts where the proceedings in bankruptcy shall be pending, shall have a general superintendence and jurisdiction of all cases and questions arising under this act, and, except when special provision is otherwise made, may, upon bill, petition or other process of any party aggrieved, hear and determine the case (as) in a court of equity." The complainants, having proved their debt against the bankrupt, contend that they may be considered parties aggrieved by any order of the district court allowing the probate of other debts against the same bankrupt, when the assignee refuses to appeal from the order, or allow an appeal to the circuit court. It is true their bill was not filed in the circuit court until about four months and a half after the order complained



---

First National Bank of Troy agt. Cooper.

---

of was made. But the act of congress prescribes no time within which the application for a review must be presented. An appeal is required to be taken within ten days. Not so with a petition or bill for a review. Undoubtedly the application should be made within a reasonable time, in order that the proceedings to settle the bankrupt's estate may not be delayed; but neither the act of congress, nor any rule of this court, determines what that time is. At present, therefore, it must be left to depend upon the circumstances of each case. Perhaps, generally, it should be fixed in analogy to the period designated within which appeals must be taken (*Littlefield agt. The Delaware and Hudson Canal Company, Bank. Reg., vol. 4, p. 77*). It is, however, to be observed that the bill does not charge any fraudulent collusion between the assignee and Cooper, Vail & Co. At most, it charges neglect of duty by the assignee in omitting to contest the debt claimed, and in failing to appeal from a decree of the district court allowing the debt. Whether this presents a proper case for a review under the second section of the bankrupt act need not now be decided. For should it be conceded that the complainants had a right to apply to the circuit court for a review of the order of the district court, and conceded also that this bill may be regarded as such an application, the question would still remain whether the court erred in dismissing it. Had the court, in the exercise of its superintending jurisdiction, heard the case and decided it, as the district court did, the decision would have been final, and no appeal could have been taken to this court (*Morgan agt. Thornhill, 11 Wallace, 65; Tracy agt. Almyer, 46 New York, 598*). True, if the court had decided that it had no jurisdiction to review, this court might have entertained an appeal, not for the purpose of reviewing, but for the purpose of correcting an erroneous decision respecting the power of the circuit court, and enabling the complainants to be heard on their application (*People agt. New York C. R. R. Co., 29 New York, 418*). But it does not appear that this bill was dismissed because

---

First National Bank of Troy agt. Cooper.

---

the court thought it had no power to review the action of the district court at the suit of these complainants. On the contrary, it rather appears the bill was dismissed, because it presented no case that called for the exercise of the superintending jurisdiction of the court. The statute, though conferring the power, does not make it obligatory upon the circuit court to retry every decision of the district court which a creditor, supposing himself aggrieved, may ask the court to retry. And it may well be that when, as in this case, a question of fact has been twice tried, and twice decided in the same way; when it is not averred that there has been any collusion between the assignee and the creditor who has proved a debt, or that the complaining party has any evidence which he has not already submitted, or that he has been hindered by any accident or fraud from presenting his case as fully in the district court as he can in another tribunal; when the substance of all he alleges is that, in his opinion, the court should have determined the facts differently, it may well be that the circuit court, in the exercise of its discretionary power, looking also at the delay of the application, may properly conclude that no sufficient case is presented calling for a retrial of the facts.

We do not perceive, therefore, in the action of the circuit court, anything that requires correction, and the decree is affirmed.

---

Smith agt. Matson.

---

## SUPREME COURT.

JOHN SMITH, appellant, agt. ASAHIEL MATSON, respondent.

*Jurisdiction — order for publication — service of process — absconding debtor.*

Where the proof tends strongly to establish the facts, of which a judge is required by the statutes to be satisfied (*Code*, § 135, &c.), in order to acquire jurisdiction to make an order for the publication of the summons, his acts in issuing such order are not void, although they may be erroneous and subject to be vacated on error or appeal.

Where the proof is sufficient to require the judge to decide as to the residence of the defendant, and as to where the summons and complaint should be directed to him by mail, and his direction in the order is erroneous in that particular, it is not void.

Such an order is valid until set aside; and the plaintiff, on compliance with it, is entitled to apply to the court for judgment.

It is competent for the court to order the filing of security for restitution, in case the defendant should become entitled to it.

The defendant is not precluded, by lapse of time, from moving to set aside the judgment entered against him by default, in such a case, as being void, upon the usual affidavit of merits and advice of counsel, although notice of the judgment was served upon him some thirteen years prior to the motion.

The jurisdiction of all courts and officers may be questioned whenever their proceedings or decisions are made the foundation of any claim.

*Quere.*: Whether the statute, in relation to the service of summons by publication (*Code*, § 135), does not authorize, in the case of an absconding or concealed defendant, resident of this state, a general judgment, without previous attachment, or seizure of any property. If so, the court cannot, by general rule (34), deprive the party of the benefit of the statute.

*Fourth Department, Rochester General Term, April, 1874.*

*Before MULLIN, P. J., E. DARWIN SMITH and GILBERT, JJ.*



---

Smith agt. Matson.

---

MOTION by defendant to set aside the judgment entered by default against him in this case on the ground that it is void for want of jurisdiction in the officer granting the order for publication of the summons.

It will be necessary, in order to show the full grounds of the motion, as well as the opposition to it, to give the affidavits, &c., quite full, together with the briefs of counsel and the order of the court.

The first affidavit is that of the defendant, Asahel Matson, sworn to on the 25th November, 1873, as follows :

JOHN SMITH, Appellant, agt. ASAHEL MATSON, Respondent.	}
--	---

MONROE COUNTY, ss.: Asahel Matson, the above-named defendant, being sworn, says: That he has learned, by an examination of the records of the clerk's office of Monroe county, that on or about the 16th day of August, 1860, the above action was commenced by the filing of a summons and complaint therein, in which the plaintiff claimed to recover against deponent \$106.55 on a note and an assigned account; that no summons or complaint was ever served on deponent in this action, personally, but said records show that Horace J. Thomas, the plaintiff's attorney, procured an order for the service of the said summons by publication, on his and plaintiff's affidavits of an inability to serve it personally on deponent for reasons as stated in said affidavits on file in this action.

Deponent further says: That, as appears from said records, judgment was entered in this action in favor of the plaintiff, against deponent, on the 7th day of January, 1861, for \$141.50 damages and costs, and on that day was docketed in the Monroe county clerk's office.

That no execution was issued on said judgment, as deponent is informed by the clerk of said county, and returned

---

Smith agt. Matson.

---

to said office by the plaintiff until on or about the 10th day of October, 1871, when the said Thomas, as attorney for the plaintiff, issued an execution upon said judgment to the sheriff of Orleans county, where deponent then, and had before then, resided for forty or fifty years, then next preceding, against the personal property of the defendant, to collect said judgment and delivered the same to one Stephen Church, a deputy of the sheriff of Orleans county.

That, as it appears by the indorsement on said execution, said deputy, on the 12th and 21st days of October, 1871, levied upon and advertised and sold 207 bushels of wheat in the barn, and belonging to deponent, in Clarendon, Orleans county, in satisfaction of said execution.

Deponent further says that he has been an actual resident of said town of Clarendon for fifty-seven years or more, last past, and still resides there; and that he resided on the farm in Clarendon, where said wheat was raised by him and taken by said sheriff, since 1832; and was an actual resident with his family on said farm during January, 1860, and carried on said farm, and has never been absent from said town during said period, except temporarily on short visits to his friends; that in the year of 1860 he resided on said farm with his family and carried it on; that on the 12th of June, 1860, deponent, being in ill health, went only to the state of Ohio to visit his relatives, leaving his wife and two children, his son in charge of his farm; never went to California or started for or intended to go there, or tell any one so, or try to keep out of the way of anybody or anything, or the service of papers on him; and he returned to his said farm in Clarendon on or about the 20th day of August, 1860, and deponent was entirely ignorant of any proceedings or judgment against him in the above action until some time after the 24th day of August, 1871; that when the levy and sale was made of said wheat, deponent was temporarily absent from his said farm, in the town of Ogden, Monroe county, with his two sons, and when he returned he found his

---

Smith agt. Matson.

---

granary had been broken open and 207 bushels of wheat taken and sold by the plaintiff, bid in by him, and taken to Brockport; that deponent never saw or heard of any notices for the sale of said property, and had no knowledge of any levy or any judgment; and the whole matter seemed to be kept secret from deponent until the wheat was sold and taken away; that deponent has been ever since inquiring into and trying to investigate the plaintiff's proceedings; and he has caused the clerk of Monroe county to examine the records and files of his office, and he has copied the judgment record and the proceedings in this action, and the clerk has certified that he can find no execution but the execution hereinbefore mentioned; and deponent can find no proceedings, on diligent inquiry and search, for any proceedings in any court, for leave to issue said execution; and no proceedings for that or any purpose have, at any time, been served on the deponent. And deponent further says that he has fully and fairly stated this case to his counsel in this action, Messrs. Tucker & Bowen, counsellors, practicing and residing at Rochester; and that he has a good and substantial defense upon the merits to said action, as he is advised by his said counsel after the statement aforesaid, and verily believes to be true.

The next is the affidavit of H. D. Tucker, sworn to on the 28th November, 1873, as follows:

JOHN SMITH, Appellant, agt. ASAHEL MATSON, Respondent,	}
--	---

MONROE COUNTY, ss.: H. D. Tucker, being sworn, says he is one of the attorneys for the defendant in this proceeding to set aside the judgment in this action; that he has recently examined, diligently and carefully, the files of judicial proceedings in the Monroe county clerk's office to ascertain whether an attachment had been issued and levied upon property of defendant in this action and



---

Smith agt. Matson.

---

returned; and also for proceedings to obtain such attachment and the undertaking required by law; and also for executions and applications to the court for leave to issue an execution upon said judgment; and he has examined the docket of said judgment, and he can find no attachment or proceedings for an attachment or undertaking, or affidavit of the issuing or levy of any attachment or proceedings for leave to issue an execution or any papers relating to such papers or proceedings, or any memorandum relating to the same in such action, except the execution referred to in the affidavit of the defendant hereto attached; that he has caused the clerk of said county to make diligent search for such proceedings, and he has been wholly unable to find them or any such proceedings, and has duly certified thereof.

And deponent further says that the only papers or proceedings in this action said clerk or deponent has been able to find on such search and examination are the summons and complaint filed August 16th, 1860; the affidavits of John Smith, plaintiff, and Horace J. Thomas, his attorney, to procure an order for service of the summons by publication; the order of publication made by the county judge, two affidavits of the publication of a summons in the action, and another affidavit of said Horace J. Thomas, that there had been no appearance of said defendant and of depositing the summons and complaint in the post-office; the order of reference, the report of the referee, the bill of costs and another summons and complaint in the same action, constituting a part of the judgment roll; the order for judgment and the judgment, and the execution referred to in the defendant's said affidavit. Deponent verily believes that the foregoing papers and proceedings are all and the only proceedings in this action; that the place of trial is Monroe county, and that the annexed affidavits, purporting to have been made by John Smith and Horace J. Thomas, are true copies of such affidavits, upon which the order of publication in this action was founded and on file in this action.

---

Smith agt. Matson.

---

The defendant then produces the affidavit of John Smith, the plaintiff, sworn to on the 5th day of August, 1860, as follows :

JOHN SMITH, Appellant,	}
agt.	
ASAHEL MATSON, Respondent.	

MONROE COUNTY, ss.: John Smith, of Brockport, in said county, being duly sworn, deposes and says that he has a good cause of action against the above-named defendant for the amount due on a promissory note given by said defendant to said plaintiff of fifty dollars and interest, which said note was given to defendant for money borrowed by defendant; also upon an account for boots and shoes and repairing, together with orders paid to him, said defendant, of \$56.55, with interest thereon, which said account has been duly sold, assigned and transferred to plaintiff by the owners thereof, Wicks & Benedict; that a summons and complaint in this action has been issued to the sheriff of Orleans county, where the said defendant resided up to about the first of June last, as deponent is informed and believes; that said sheriff made diligent search for said defendant for the purpose of serving said summons and complaint, and writes back to said deponent's attorney that said defendant cannot be found; that he has left for California, so that said summons and complaint cannot be personally served; and deponent verily believes the same to be true; that deponent cannot state at what particular place in California said defendant proposes to remain when he arrives there, but he is now on his way, and a sufficient length of time has elapsed for him to be at or very near San Francisco, which is, as near as can be ascertained, as to his whereabouts; and further says not.

Defendant also produces the affidavit of Horace J. Thomas, sworn to on the 15th of August, 1860, as follows :

---

Smith agt. Matson.

---

JOHN SMITH, Appellant, agt. ASAHEL MATSON, Respondent.	}
--	---

MONROE COUNTY, ss.: Horace J. Thomas, of Brockport, being duly sworn, deposes and says that he is attorney for the plaintiff in this action; that he caused a summons and complaint to be issued in this action against the said defendant, on the sixteenth day of June last, to the sheriff of the county of Orleans, where the defendant resided up to the first day of June last; that said sheriff endeavored to have the said summons and complaint served, but could not for the reason defendant had absconded and left for California; that said sheriff thus wrote to deponent that he was unable to serve said summons and complaint by reason of his having left his county as aforesaid; that deponent was then directed by said plaintiff to go to the late residence of the defendant and ascertain what he could relative to said defendant; that deponent did so, and called upon the family of defendant, who were still there, and inquired for said defendant, and that said family refused to give deponent any information about him, only that he had left, was not there, but refused to give any information as to where he had gone; that deponent then inquired of his immediate neighbors and ascertained defendant had gone to California; that he was largely indebted to various persons, some of whom were endeavoring to find him for the purpose of serving process on him, but were unable to do so by reason of his departure; that defendant was a farmer and occupied a farm and carried it on, and had left his family in possession thereof—crops upon it, with team and farming utensils, a large quantity of fire-wood and other personal property; that he had pretended to execute and deliver a bill of sale of the same to his wife, and she claimed to hold said property by virtue thereof; that he had some interest in the farm occupied by him; and further deponent says not.



Smith agt. Matson.

Defendant's notice of motion comes next, as follows :

JOHN SMITH, Appellant,  
agt.  
ASAHEL MATSON, Respondent.

SIR.—Take notice, that on the foregoing affidavits, with copies whereof you are herewith served, and the judgment roll and the papers and proceedings on file in this action, in the Monroe county clerk's office, a motion will be made at the adjourned special term of this court, to be held at the court-house, in Rochester, on the second Monday of December, 1873, at 10 o'clock A. M. of that day, to set aside the judgment rendered in this action, on the ground that the court never acquired any jurisdiction to render said judgment; that the affidavits, upon which the order of publication was made, were defective and wholly insufficient in the statement of facts sufficient to found said order upon; that no attachment in the action was issued and levied on defendant's property, nor undertaking made and filed as required by law; that the summons published was not the summons filed or ordered to be published, nor the summons on which the judgment was rendered, and for such other rule or order in the premises as the court may grant, with costs.

Yours,

TUCKER & BOWEN,  
*Rochester.*

*November 25, 1873.*

To HORACE J. THOMAS, Esq.,  
Plaintiff's Attorney, or  
JOHN SMITH, Plaintiff.

Papers in opposition to the motion—first, the affidavit of the plaintiff, John Smith, sworn to on the 23d of December, 1873, as follows :

---

Smith agt. Matson.

---

---

JOHN SMITH, Appellant, agt. ASAHEL MATSON, Respondent.	}
--	---

---

MONROE COUNTY, ss.: John Smith, the plaintiff in this action, being duly sworn, deposes and says that he lent and advanced to defendant the sum of fifty dollars at his request and took his note therefor; that defendant never has paid or offered to pay one cent thereof since he received said money, and that he is and has become totally insolvent; that the balance of damages included in the judgment in this action was for boots and shoes, and repairing same, worn by the defendant and his family, and for which, after he had bought the same, he never paid one cent, or offered to pay for the same, as deponent is informed and believes; that said account was duly transferred and assigned to him by Messrs. Wicks & Benedict, of Brockport, N. Y.; that deponent procured an execution on said judgment, which was issued by Thos. S. Dean, the then partner of deponent's attorney, Horace J. Thomas, the said Thomas being away at the time; that the same was deposited by deponent in the hands of Mr. Stephen Church, then one of the deputy sheriffs of Orleans county; and he, by virtue thereof, levied upon a quantity of wheat of defendant's, and advertised the same for sale by putting up public notices thereof as required by law, and deponent attended said sale on the day thereof; that a number of persons attended said sale, and said property was exposed for sale at public auction, and deponent bid in said property, he being the highest bidder therefor; that said sale was conducted openly, without any attempt at secrecy or anything of the kind; that in the autumn of 1861 deponent called on said defendant at his residence, in the town of Clarendon, after judgment had been entered in this action, and after defendant had returned into this state; that deponent called upon said defendant for

---

Smith agt. Matson.

---

the purpose of obtaining his pay on said judgment, and so informed him ; that deponent asked defendant if he was so he could pay that judgment ; that defendant said he had not got the money ; that deponent then asked him if he could not let him have some wood or hay upon it ; that defendant said he had no wood, but he would let deponent have some hay, and he would draw it in a short time ; that he should have paid it before, but money matters had been tight with him so he could not, but he would soon pay the whole of it ; that substantially was the conversation on that occasion ; that he said he had notice of said judgment, and that he had not been able to pay, because money matters had been tight with him, but he would pay the whole matter in a very short time ; that deponent knows that said defendant never had any defense to said action on the merits, because he never paid deponent anything upon said note, nor upon said account for boots and shoes, as deponent is informed and verily believes ; and further says not.

The affidavit of Edger Benedict, sworn to on the 23d of December, 1873, as follows :

JOHN SMITH, Appellant,	}
agt.	
ASAHEL MATSON, Respondent.	

MONROE COUNTY, ss.: Edgar Benedict, of Brockport, being duly sworn, deposes and says that he was and is one of the firm of Wicks & Benedict, and has been such for twenty-one years, last November ; that he knows defendant, and that said firm had the account for boots and shoes, and for repairing same ; that defendant never paid anything to said firm upon said account previous to the assignment thereof ; that said firm, for value received, sold and assigned said demand and account to the plaintiff in this action ; and further says not.



---

Smith agt. Matson.

---

The affidavit of Horace J. Thomas, sworn to on the 23d December, 1873, as follows :

JOHN SMITH, Appellant, agt. ASAHEL MATSON, Respondent.	}
--	---

MONROE COUNTY, ss.: Horace J. Thomas, of Brockport, in said county, being duly sworn, deposes and says that he was the plaintiff's attorney in this action; that judgment was entered as stated in the moving papers, and at that time, as therein stated; that soon after said judgment was entered, and after the defendant had returned to this state, deponent served a notice of judgment in this action upon the defendant, of which a copy is hereto annexed, by depositing a copy of said notice in the post-office at Brockport, inclosed in an envelope, and directed to the defendant by name, at Clarendon, Orleans county, N. Y., and, at the same time, paying the postage thereon; that this deponent, within a few weeks thereafter, met the said defendant at Holley, in the said county of Orleans, and asked him if he had received said notice of said judgment, and he replied that he had; that he should have paid said demands, but was unable to do so then, but he hoped before a great while he would be able to do so; that he owed said demand; that, as near as deponent can recollect the said conversation, it was some time in March, 1861, but deponent cannot be certain, as it was so long ago, but he knows it was after said judgment was entered, and after defendant had returned to this state; that deponent is informed and believes that said sale was duly notified and conducted by Stephen Church, a deputy sheriff of Orleans county, and was conducted in an open, public manner, without any attempt at secrecy or anything of the kind; and further deponent says not.

---

 Smith agt. Matson.
 

---

Notice of judgment, as follows :

JOHN SMITH, Appellant,	}
agt.	
ASAHEL MATSON, Respondent.	

---

*Notice Judgment.*—Judgment entered January 7th, 1861 :

Service by publication, for damages.....	\$110 04
Costs.....	31 46
Judgment.....	<u>\$141 50</u>

Entered in Monroe county, and transcript sent to Orleans county, N. Y.

*To Asahel Matson, defendant:* You will please take notice of the judgment above described, and that the same was entered as stated above, and that the summons herein was served by publication.

Dated *January 10th*, 1861.

Yours, &c.,

H. J. THOMAS,

*Attorney for Plaintiff.*

The affidavit of Horace J. Thomas, sworn to on the 23d of December, 1873, as follows :

JOHN SMITH, Appellant,	}
agt.	
ASAHEL MATSON, Respondent.	

---

MONROE COUNTY, ss.: Horace J. Thomas, of said county, being further sworn deposes and says that he, as the attorney of plaintiff, on the 11th day of January, 1861, issued an execution, in due form of law, on the judgment in this action, to the sheriff of Orleans county, and the same was sent by mail to the said sheriff, on

---

Smith agt. Matson.

---

the said 11th day of January, 1861, and he was informed by said sheriff that the same was afterwards returned unsatisfied; that deponent kept a register of the proceedings in said cause, and he made memorandums of the proceedings in said cause, and under date of January 11th, 1861, he entered as follows, viz.: "Sent transcript and execution to Orleans;" that deponent understood at that time that said defendant was insolvent, and, so understanding, after he issued said execution paid no further attention to it; that on the 10th day of October, 1871, deponent's partner issued another execution upon said judgment to Orleans county at the request of the plaintiff; that afterwards he was informed that the then sheriff had levied on some wheat; that deponent did not attend the sale of said property, but afterwards he was informed by said plaintiff that he bid in said property; and further says not.

Then comes an affidavit of A. L. Mabbitt, clerk of the county of Monroe, sworn to December 28, 1871, stating that the annexed copy of an execution in the cause, dated October 10, 1871, is the only execution in the cause he could find on file in his office. This execution was indorsed by plaintiff's attorney to levy \$141.50, with interest from January 7, 1871, and directed to the sheriff of Orleans county, who made the following indorsements upon it:

By virtue of the within execution, I have levied on 200 bushels of wheat, the property of defendant.

S. CHURCH.

*October 12th, 1871.*

By virtue of the within execution, I have levied on seven bushels of wheat, the property of defendant.

S. CHURCH.

*October 21st, 1871.*

The within execution paid and satisfied October 30, 1871.

S. CHURCH,

*Deputy Sheriff.*



---

Smith agt. Matson.

---

Then comes the adjustment of plaintiff's costs at \$31.46. Then the affidavit of A. L. Booth, sworn to December 24, 1860, stating that the copy of the summons in the cause annexed was published six weeks in the Rochester Evening Express; also the affidavit of Wm. H. H. Smith, showing the publication of the same summons annexed for six weeks in the Brockport Daily Advertiser. Then the affidavit of Horace J. Thomas, sworn to December 8, 1860, as follows:

JOHN SMITH, Appellant, agt. ASAHEL MATSON, Respondent.	}
--	---

MONROE COUNTY, ss.: Horace J. Thomas, of Brockport, in said county, being duly sworn, deposes and says that a summons has been duly published in two newspapers agreeably to an order of this court made in this action and entered with the clerk of this court; that no appearance of the defendant has been entered, nor has any answer or other pleading been served on deponent therein; that immediately on the granting of the order for publication deponent deposited a copy of the summons and complaint in this action in the post-office at Brockport, aforesaid, directed to the defendant at San Francisco, California, the place of residence of said defendant, as near as the same could be ascertained, and, at the same time, paying the postage thereon; that previous to the granting of said order the complaint in this action had been duly filed at Rochester with the clerk of this court; and further says not.

Next comes the order of the county judge, as follows:

JOHN SMITH, Appellant agt. ASAHEL MATSON, Respondent.	}
---	---

MONROE COUNTY, ss.: It appearing to my satisfaction, by affidavit, that the defendant cannot, after due diligence, be

---

 Smith agt. Matson.
 

---

found within this state, and that a cause of action exists against him, the said defendant, and that said defendant has property within this state, I do hereby order that the summons herein be published in two newspapers printed in the county of Monroe, to wit, the Rochester Express and the Daily Advertiser, at Brockport, once in each week for six weeks; and that a copy of the summons and complaint be forthwith deposited in the post-office, directed to the said Asahel Matson, at San Francisco, state of California, or that personal service of copies of said summons and complaint be made on said defendant.

JOHN C. CHUMASERO,  
*Monroe County Judge.*

Dated *August 16th*, 1860.

Next come copies of the summons and complaint, demanding judgment for \$106.55, with interest, &c. Next, copy order referring cause to Wm. H. Bowman, Esq., of Brockport, and copy of his report in favor of the plaintiff for \$110.04, with costs, dated December 31, 1860. Next, an order that plaintiff's attorney, on filing the report of the referee, be at liberty to enter judgment in the action. Next, the entry of judgment for \$110.04 damages and \$31.46 costs—amounting to \$141.50. Next, the order of the special term setting aside and vacating the judgment, as follows:

At a special term of the supreme court held at Rochester, Monroe county, on the 31st day December, 1873:

Present—Hon. DAVID RUMSEY, *Justice.*

### SUPREME COURT.

JOHN SMITH	}
agt.	
ASAHEL MATSON.	

On reading and filing the affidavits and moving papers on the part of the defendant, and those of the plaintiff, opposed,

---

 Smith agt. Matson.
 

---

and after hearing H. D. Tucker, Esq., for motion, and H. J. Thomas, Esq., opposed, ordered that the judgment of the plaintiff in this action, in favor of the plaintiff against the defendant, be and the same is hereby vacated, set aside and held for naught, and that defendant recover ten dollars costs of this motion. The judgment hereby vacated and set aside was entered and docketed in the Monroe county clerk's office on the 7th day of January, 1861:

For damages.....	\$110 04
Costs.....	31 46
Judgment.....	<u>\$141 50</u>

B. F. FREEMAN,  
*Sp. Dep. Clerk.*

Next, the notice of appeal to the general term, as follows:

IN SUPREME COURT — COUNTY OF MONROE.

JOHN SMITH agt. ASAHEL MATSON.
--------------------------------------

} *Notice of appeal  
from an order.*

Please to take notice that the plaintiff in the above-entitled action appeals from an order made therein on the 31st day of December, 1873, by the special term of the supreme court, setting aside the judgment herein to the general term of this court.

Yours, &c.,

THOMAS & DEAN,  
*Attorneys for Plaintiff.*

To TUCKER & BOWEN, Esqrs.,  
*Attorneys for Defendant, and*  
JOHN H. WILSON, Esq.,  
*Clerk of the County of Monroe.*



---

Smith agt. Matson.

---

*H. R. Selden*, for plaintiff, appellant.

The judgment was entered by default, on publication of the summons against the defendant, as an absconding debtor, having departed from the states "with intent to defraud his creditors, or to avoid the service of a summons," within *subdivision 2 of section 135 of the Code of Procedure*.

The only grounds of objection to the judgment, at the special term, were :

1st. That the affidavits were insufficient to give the judge jurisdiction to make the order of publication.

2d. That the order of publication was insufficient, as it did not direct the summons and complaint to be mailed, directed to Clarendon, the former place of residence of the defendant, and from which he had absconded.

We understand that the order appealed from proceeded on the last-mentioned ground.

*First.* The affidavits were amply sufficient to give the judge jurisdiction (*Affidavits John Smith, fols. 20 to 24; affidavits Horace J. Thomas, fols. 25 to 29*).

The affidavits show the following facts :

1. That the plaintiff had a good cause of action against the defendant.

2. That a summons and complaint in this action were duly issued to the sheriff of Orleans county, "where the defendant resided up to about first of June," 1860, for service.

3. "That the said sheriff endeavored to have the said summons and complaint served, but could not, for the reason defendant had absconded and left for California."

4. That the sheriff wrote to the plaintiff's attorney, that he had made diligent search for the defendant, for the purpose of serving said summons and complaint, and that defendant could not be found, for the reason that he had absconded and left for California.

5. That plaintiff's attorney, then at the request of plaintiff, went to "the late residence of the defendant to

---

Smith agt. Matson.

---

ascertain what he could," relative to him; found some of his family still there, who refused to give any information about him, only that he had left—was not there, but refused to give any information where he had gone.

6. The attorney then ascertained, from the immediate neighbors of the defendant, that he had gone to California; that he was largely indebted to various persons, some of whom were endeavoring to find him, for the purpose of serving process upon him, but were unable to do so by reason of his departure.

7. That before leaving he had executed a bill of sale of what property he left to his wife, who claimed to hold by virtue thereof (*Von Rhade* agt. *Von Rhade*, 2 N. Y. S. C. R., 491-495).

These affidavits are more than sufficient to give the judge jurisdiction to make the order; all that is requisite for this purpose is, that the affidavits should *tend to establish the facts*, of which the judge is required, by the statute, to be satisfied; and when such affidavits are produced, the judge acquires jurisdiction, and his acts are not void, although they may be erroneous and subject to be vacated on error or appeal (*Wells* agt. *Thornton*, 45 Barb., 390-394; *Collins* agt. *Ryan*, 32 id., 647; *Matter of Faulkner*, 4 Hill, 598, 601, 602; *Van Alstine* agt. *Erwin*, 1 Kern., 340, 341; *Skinnion* agt. *Kelley*, 18 N. Y., 355).

Within the authority of these cases the affidavits were sufficient, beyond all question, to give to the county judge jurisdiction to pass upon the question whether the order of publication should be made or not, and his order, therefore, was not void, whether the decision was such as this court would or would not have made on the same evidence.

*Second.* The affidavits were not only sufficient to give the county judge jurisdiction, so that his order was not void, but were entirely sufficient to sustain the order, even if an application had been made at that time to set aside the proceedings.

The affidavits furnished sufficient *prima facie* evidence of

---

Smith agt. Matson.

---

all the facts which the statute required to be shown to the satisfaction of the judge, to entitle the plaintiff to the order.

I will not repeat the affidavits, but refer the court to the above synopsis of them, and ask the court to compare them with the statute.

*Third.* The order made by the judge was in all respects correct, and sufficient to justify the judgment afterwards entered in pursuance of it.

No objection can be made to the order, except in the *direction* that the copy of the summons and complaint should be mailed to the defendant at San Francisco, California.

The claim is, that it should have been directed to him at Clarendon, where he had resided, and where his family remained, on the ground that that was "his place of residence."

We deny that Clarendon was his place of residence, as shown by the affidavits. The affidavits show that Orleans county was "where the defendant resided up to about the first of June." That that was "the late residence of the defendant." The summons was issued on the sixteenth of June, but could not be served, "for the reason that defendant had absconded and left for California." "That he was largely indebted to various persons, some of whom were endeavoring to find him, for the purpose of serving process on him, but could not, by reason of his departure."

That his family refused to give any information where he was; that he had made a bill of sale of his property to his wife, who claimed to hold it by virtue thereof.

This proves, *prima facie*, the absconding of the defendant to California, to defraud his creditors, or to avoid the service of process. This proof is all the case admits of, as absconding debtors do not advertise their intentions, or take witnesses along with them to be sent back and testify to their movements and designs.

"A liberal indulgence must be extended to these proceedings, even upon questions of jurisdiction, if we would not render them a snare rather than a beneficial remedy" (*Per*



---

Smith agt. Matson.

---

DENIO, *J.*, 11 *N. Y.*, 341; *Van Alstyne* agt. *Erwin*). The affidavits in this case were not so strong as in the present case, but were held sufficient, by all the courts, to sustain an attachment against the defendant as an absconding debtor.

So in this case, the *affidavits* were *sufficient to show* (however the fact might be) that Matson had absconded to California.

The fact that his family remained in Clarendon was not *conclusive* on that question.

If he absconded to California *without* an intention to return, his residence no longer remained in Orleans county.

The judge, from the affidavits, might well have concluded, and no doubt did so, that such was his intention. His order was therefore correct.

We may concede that the order to mail the summons and complaint to San Francisco was of no service, because that was not shown to be his residence. But it was shown by the affidavits that that was as near as his residence could be ascertained, which was equivalent to saying that his residence could not be ascertained, and *that rendered any order to serve by mail unnecessary* (*Code*, § 135).

It is no answer to this position to say that then Matson was not "a resident of this state," within subdivision 2 of section 135, when the summons was issued.

He was "a resident of this state" *when he absconded*, and that is all that the statute requires. It was intended to apply to just such a case as this appears on the papers to be, the case of a debtor absconding and taking his residence with him.

The statute does not contemplate that in such a case the summons and complaint shall be mailed to him at his "late residence."

If his residence, *when the order is applied for*, is known, or can with reasonable diligence be ascertained, the order must provide for service by mail addressed *to such place of*

---

Smith agt. Matson.

---

*residence.* If not known, or not capable of being ascertained, then no mail service is required.

That we used due diligence to ascertain the residence, and failed, is clearly shown. We went to his "late residence," inquired of such of his family as remained there, and of his late neighbors, without success.

*Fourth.* But whether the judge decided correctly or not, the affidavits were sufficient to require him to decide the question where the summons and complaint should be directed, and his order, though possibly erroneous, was not void (*Pinckney agt. Hageman*, 4 *Lans.*, 374; *Van Alstyne agt. Erwin*, 11 *N. Y.*, 340, 341).

In this case, DENIO, J., says: "It must be kept in mind, that the law has committed to the county judge, and not to us, the duty of determining as to the cogency of the proof. The criticism which the defendant's counsel asks us to indulge in would, if generally applied to such proceedings, render them extremely hazardous, not only to the parties setting them on foot, but to the officers concerned in their execution; for when we determine that a sufficient case was not made for the exercise of the judgment of the officer, we must consider the judge and all the parties trespassers in whatever they do."

The opinion of judge SMITH, in *Wells agt. Thornton*, above cited (45 *Barb.*, 393, 394), covers this case. As the judge there said, "if he" (the county judge) "erred in his decision upon such evidence, it was a judicial error which might be reviewed and rectified upon appeal, or upon motion to set aside the order and proceedings, but could not be questioned in a collateral proceeding."

If there was any error in the order, it was the error of the judge, and was valid until set aside—of course, *on our compliance* with it, it entitled us to apply to the court for judgment (*Code*, § 246, *sub.* 3).

It was competent for the court to order the filing of secu-

---

Smith agt. Matson.

---

rity for restitution, in case the defendant should become entitled to it (*Id.*).

There has been no claim that our affidavits of publication, etc., did not show a compliance with the order; no complaint of that kind is made in the notice of motion (9 *How.*, 35, *Rule* 46).

*Fifth.* The judge who made the order and the court that rendered the judgment having had jurisdiction, the defendant is not now entitled to have the proceedings set aside for error or irregularity—if there were any in obtaining the judgment.

The judgment was entered January 7th, 1861.

Soon after the judgment was entered, a perfect notice of the same was mailed by the plaintiff's attorney, directed to the defendant at Clarendon, Orleans county—to which place he had returned—with notice that "*the summons was served by publication.*"

In *March*, 1861, the defendant met the plaintiff's attorney, and in answer to the inquiry if he had received notice of said judgment, replied that he had; that he should have paid the said demands, but was unable to do so then, but hoped before a great while to be able to do so; that he owed said demand.

Now, *at the end of fourteen years*, he moves to set aside the judgment for error or irregularity.

He makes the ordinary general affidavit of merits, which would probably be justified by the statute of limitations; and the advice of counsel was probably based solely on that ground. He makes no attempt to answer the specific facts stated in the affidavit on which the order of publication was obtained, showing the nature and justness of the plaintiff's claim.

Nor does he attempt to answer the facts proved before the referee (*Freeman on Judgments*, § 102).

By the section of the Code under which the publication was made (§ 135), the defendant is expressly "allowed to



---

Smith agt. Matson.

---

defend after judgment, or at any time within one year after notice thereof, and within seven years after its rendition, on such terms as may be just" (*Bank of Genesee* agt. *Spencer*, 18 N. Y., 154).

We insist that when the judgment is not void, but valid, though errors or irregularities may have occurred in the proceedings, the defendant is limited by this provision to one year after notice of the judgment for obtaining relief, either on that account or on the merits (*Depew* agt. *Dewey*, 2 N. Y. S. C., *Rep.*, 515).

It certainly confines him to such year for his application for relief on the merits, and there is much greater propriety in the same limitation for relief against technical errors or irregularities, and the statute in terms embraces them all.

And this limitation, thus construed, accords with the general rules in relation to such motions (2 R. S., 359, § 2; Code, § 174; *Cook* agt. *Dickerson*, 1 Duer, 679-687; *Park* agt. *Church*, 5 How., 381; *Van Benthussen* agt. *Lyle*, 8 How., 312).

If the defendant's motion was not barred by the express provisions of the statute, it is so by the general practice of the court, which requires such motions to be made promptly (*Persse & Brooks* agt. *Willet*, 14 Abb., 119; *Mayor of N. Y.* agt. *Lyons*, 24 How., 280, 282; 10 Paige, 408; *Graham's Practice*, 2d ed., 702).

*Sixth.* If the defendant is entitled to any relief, it is to be allowed to come in and answer the complaint, and to have the question of his liability for the plaintiff's claim duly tried, the judgment in the meantime to remain as security (*Von Rhade* agt. *Von Rhade*, 2 N. Y. S. C. R., 491-498).

*If he really owed the debt, there are no merits whatever in his application.*

We are willing to have that tried if he wants to try it; but as he does not pretend by his affidavit that he did not

---

Smith agt. Matson.

---

owe the debt, we think he lays no basis for any such equitable relief.

If he should be admitted to defend, however, he should be prohibited from setting up the statute of limitations (*Hawes agt. Hoyt*, 11 *How.*, 454).

Not void though irregular (6 *N. Y.*, 254; *Curtis agt. Hitchcock*, 10 *Paige*, 399, 408; *Potter agt. Rowland*, 8 *N. Y.*, 450, 451; *People agt. Norton*, 9 *id.*, 178).

Since these points were printed, my attention has been called to Rule 34 (*Rule 25 of 1858*) which I had overlooked.

*First.* The validity of Rule 34 is open to some question :

1. It is doubtful whether the statute in relation to the service of summons by publication (*Code*, § 135) does not authorize (where the defendant is an absconding or concealed resident of the state) a general judgment, without previous attachment or seizure of any property.

If that be the true interpretation of the statute, the court cannot by general rule deprive the party of the benefit of the statute.

The difference between subdivisions 2 and 3 of section 135 would seem to justify this position. Under subdivision 3, the non-resident cannot be proceeded against *unless he has property in this state*.

But under subdivision 2, the absconding or concealed resident can be proceeded against, *whether he has any property in the state or not*. If this be so, Rule 34 cannot apply to cases under subdivision 2, but only to cases under subdivision 3. Subdivision 3 of section 246 tends to support our position.

2. That part of Rule 34 which requires the filing of security, for restitution, as the condition of entering the judgment, cannot be reconciled with the last paragraph of section 246 of the Code.

That paragraph gives the discretion to the court that pronounces the judgment, to be exercised in each particular case according to its circumstances. It is at least questionable

---

Smith agt. Matson.

---

whether the court can, consistently with the statute, *adjudicate in advance* every such case that can arise.

*Second.* But conceding the perfect validity of Rule 34, the failure to observe it by the court, in pronouncing judgment, renders such judgment erroneous or irregular, but not a nullity (*McNamara on Nullities and Irregularities*, 4, 5 to 9, 87, *Law Library*). At page 7, COLERIDGE, J., is quoted as saying: "It is difficult sometimes to distinguish between an irregularity and a nullity; but I think the safest rule to determine what is an irregularity and what is a nullity is to see whether the party can waive the objection. If he can waive it, it amounts to an irregularity; if he cannot, it is a nullity." *The case stated by way of illustration fully sustains our position in this case* (*Horton* agt. *Auchmoody*, 7 *Wend.*, 202, 203; *Relyea* agt. *Ramsay*, 2 *id.*, 604; see cases cited on printed points, p. 3). The true rule must be that where the court has jurisdiction to render *any judgment*, the entry of a wrong judgment is an error or irregularity merely, and not a nullity. In cases of doubt, courts hold the proceedings to be irregularities rather than nullities (*McNamara*, p. 6).

*Third.* If the judgment was erroneous or irregular merely, and not a nullity, then the defendant was too late with his motion (*See printed point V., and statutes and cases there cited; Soulden* agt. *Cook*, 4 *Wend.*, 217).

The defendant has no merits, and after the notice given him thirteen years ago, and what he then said, he should not be relieved at this day.

*H. D. Tucker*, for defendant, respondent.

*First.* The order for service of the summons in the action, by publication and deposit in the post-office, was made without proof to the officer granting it of material facts necessary to give it validity, and the order was void.

The affidavits upon which the order was made were plaintiff's and that of his attorney, Horace J. Thomas. The order



---

Smith agt. Matson.

---

was granted under subdivision 2 of section 135 of the Code. These affidavits are defective in this, to wit:

1. They do not show that the defendant could not, after due diligence, be found within the state. What the sheriff wrote who had the summons, and what defendant's neighbors said to the plaintiff's attorney on this question, are hearsay and not legal facts. The attorney does not state conversations with the neighbors, but gives his own conclusions—what he “ascertained” from his conversations with them. This is not evidence upon which the judge had the power, judicially, to act (*Campbell* agt. *McCormick*, 1 *How. P. R.*, 251; *Mosher* agt. *The People*, 5 *Barb.*, 575, 579; *Matter of Faulkner*, 4 *Hill*, 598, 601; *Miller* agt. *Brinkerhoof*, 4 *Den.*, 118; *Staples* agt. *Fairchild*, 3 *Com.*, 41, 46).

He must be satisfied, as a judge, upon legal evidence and proof. The defect is that the affidavits do not state evidence or proof tending to establish any of the particulars required by the Code, except the cause of action and the issuing of the summons. Their statements were substantially on information and belief. This is not evidence or proof of the facts as required.

If there be a total defect of evidence as to any essential fact necessary to give a court or officer jurisdiction for issuing process, the process will be declared void in whatever form the question may arise (*Staples* agt. *Fairchild*, 3 *Com.*, 46; *Broadhead* agt. *McConnell*, 3 *Barb.*, 175, 190, 191).

2. The affidavit of Thomas, if it shows anything, proves that the defendant was a resident of the county of Orleans, June 1, 1860, and it states no fact tending to show that he did not continue to reside there at the date of the affidavit, August 15, 1860, or that he did not reside there continuously. But, on the contrary, the facts sworn to show that he “was a farmer and occupied a farm and carried it on, and had left his family in possession thereof, crops upon it, with team and farming utensils, a large quantity of firewood, and other personal property, and had some interest in the farm occupied by

---

Smith agt. Matson.

---

him," were strong if not conclusive evidence that he then resided there. Therefore, as defendant's place of residence was known to the plaintiff's attorney to be in Orleans county, as shown by his affidavit, and as there was no evidence that he resided at San Francisco, California, the order, directing the summons and complaint to be sent to him through the post-office at that place, was void (*Code*, § 135; *Hallet agt. Righters & Salter*, 13 *How. P. R.*, 43; *Warren agt. Tiffany*, 17 *How. P. R.*, 106; *Tously agt. McDonald*, 32 *Barb.*, 605).

3. The affidavits did not show or state any fact tending to show that the defendant had departed from this state with intent to defraud his creditors, or to avoid the service of a summons, or that he kept himself concealed therein, with the like intent. Facts and the intent should be stated, which are wanting here (*Kelly agt. Archer*, 48 *Barb.*, 68).

*Second.* By section 135 Code, and Rule 34, which by law is made a part of that section (*Code*, § 470), no judgment could be entered without showing by affidavit that an attachment had been issued and levied upon property belonging to defendant, nor without filing the undertaking required. This was not done, and the judgment was wholly without vitality for any purpose. Judgments entered upon service by publication are in the nature of a proceeding *in rem*. It could, in no event, affect any property of the defendant, except such as had been taken by virtue of an attachment regularly issued in the action (*Warren agt. Tiffany*, 17 *How.*, 106, 108).

*Third.* The clerk had no power to enter judgment except by special order of the court. No special order was applied for or made at special term (*Hallet agt. Righters*, 13 *How.*, 43, 46; *Code*, § 246, *sub. 3*).

The records of judgments in these cases should show jurisdiction upon their face. They are in the nature of special proceedings, and nothing can be intended in their favor on the point of jurisdiction. All records of judgments should show jurisdiction of the person (*Thatcher agt. Powel*, 6 *Wheat.*, 127; *Smith agt. Fowle*, 12 *Wend.*, 11).

---

Smith agt. Matson.

---

The court in this case never having acquired jurisdiction of the defendant, the judgment is utterly void (*Hallet agt. Richters, supra, and cases there cited*).

The judgment is a cloud upon the defendant's title to his farm, and it is a matter of right to have it set aside, though more than a year has elapsed (*Hallet agt. Richters, supra*).

It is a general principle that the jurisdiction of all courts and officers may be questioned whenever the proceedings or decisions of such courts or officers are made the foundation of any claim (*Broadhead agt. McConnell, 3 Barb., 175, 183, and cases there cited; Man. Mech. Bank agt. Boyd, 3 Den., 258; Dedrick's Ad'rs agt. Richley, 19 Wend., 108*).

---

### SUPREME COURT—STATE OF NEW YORK.

At a general term of the supreme court, fourth judicial department, held at the court-house, in the city of Rochester, Monroe county, on the 29th day of April, 1874,

Present—Hon. JOSEPH MULLIN, *Presiding Justice*.

E. DARWIN SMITH,

JASPER W. GILBERT,

*Associate Justices.*

---

JOHN SMITH, <i>Appellant,</i>	}
agt.	
ASAHEL MATSON, <i>Respondent.</i>	

---

The appeal from the order of the special term, setting aside the judgment in the above-entitled action, having been brought to a hearing before this court; after hearing Henry



Smith agt. Matson.

---

R. Selden, Esq., for the appellant, and H. T. Tucker, Esq., for the respondent, it is ordered that the said order of the special term be reversed in all things, with ten dollars costs of special term and ten dollars costs upon reversal.

(Copy.)

B. F. FREEMAN,

*Sp. Dep. Clerk.*

---

Snyder agt. Davis.

---

## SUPREME COURT.

BENJAMIN SNYDER agt. ELIAS C. DAVIS.

*Exemption — property sold on execution.*

An execution issued upon the recovery of a judgment for the purchase-price of a cow, which is by law exempt from execution, may be levied on property of the defendant in the execution and sold, which would be exempt by law from execution, if the judgment had not been recovered for the purchase-money of exempt property.

*Third Department, May General Term, 1874.*

MILLER, P. J., BOCKES and BOARDMAN, JJ.

THIS cause was tried at the Montgomery county circuit on the 13th day of June, 1873, before justice JAMES and a jury. After hearing proofs of the parties and the arguments of their counsel, a verdict was directed by the court in favor of the plaintiff for \$130 damages, and the case reserved for the further consideration on defendant's motion for a nonsuit; and such consideration having been had, the verdict directed was thereby ordered vacated, and judgment directed for the defendant, on the motion for nonsuit, with costs.

The plaintiff appealed to the general term. The facts are fully stated in the opinion of the court.

*H. B. Cushney, attorney for plaintiff.**Peter G. Webster, attorney for defendant.*

BOCKES, J.—The question in this case arises under the exemption act of 1842, amended in 1859, and again in 1866

---

Snyder agt. Davis.

---

(*Laws of 1852, chap. 157; 1859, chap. 134; 1866, chap. 782*). The sale was made by defendant, as constable, under an execution against the plaintiff, issued on a judgment rendered for the purchase-money of a cow, which cow was exempt property under the provisions of the Revised Statutes of 1830. The property sold was a horse, harness, wagon and sleigh. And it is conceded that such property was exempt under the act of 1842, and the amendments thereof, unless it comes within the provisions of the last clause, which reads as follows: "Provided that such exemption shall not extend to any execution issued on a demand for the purchase-money of such furniture, tools \* \* \* or the articles now enumerated by law." Now, the act of 1842 extended the exemption declared by the Revised Statutes to certain other property therein specified (to the property sold in this case), subject to the proviso above stated.

This proviso was that this act of 1842 should be ineffectual as to any execution issued on a judgment for the purchase-money of the property thereby exempted, or for the purchase-money of "*the articles now enumerated by law*." The cow, for the purchase-money of which the judgment was recovered, was one of those articles (2 *R. S.*, 367, § 22, *sub. 4*). Therefore, by force of the proviso, the act of 1842 was ineffectual as to the exemption here claimed.

The language of the proviso is specific and clear. It provides that such exemption shall not extend to any execution issued on a demand for the purchase-money of "*the articles now enumerated by law*." Those articles were, "all sheep to the number of ten, \* \* \* *one cow, two swine*" (*et sub. 4, supra*). Now, the property here sold was not exempt by the Revised Statutes of 1830, nor by the act of 1842, giving effect to its proviso, inasmuch as the execution on which the sale was had, "issued on a demand for the purchase-money of an article then enumerated by law as exempt." And in the absence of any law exempting the plaintiff's property, it was



---

Snyder agt. Davis.

---

liable to seizure and sale on execution issued on a judgment rendered against him.

This exposition of the exemption act of 1842 and its amendments has sanction also in *Cole agt. Stevens* (9 Barb., 676), where SELDEN, J., remarks that "The natural reading of the clause seems clearly to be that the exemption allowed by the section itself shall not be available against any execution issued to collect the purchase-money of any exempt property whatever" (*See also* 10 Barb., 91). I am of the opinion that the seizure and sale of the plaintiff's property in this case was justified in law, and the nonsuit was, consequently, right. I am not unmindful of the decision in *Hickox agt. Fay* (36 Barb., 9), which is relied on by the appellant's counsel, where it was held that an execution issued on a judgment recovered on a demand for the purchase-money of exempt property must follow the identical property sold, "as if the party selling retained a specific lien thereon for the price." But this decision was overruled, or rather was not followed, in *Craft agt. Curtiss* (25 How. Pr. R., 163), and has not been regarded as sound. The question here under consideration was not before the court in *Smith agt. Slade* (57 Barb., 637; *see also*, 14 How., 519, and 3 Denio, 52).

The nonsuit in this case was right, and judgment should be affirmed, with costs.

MILLER and BOARDMAN, JJ., concur.

---

In the Matter of Owens.

---

## N. Y. COMMON PLEAS.

IN THE MATTER OF ANN ELIZA OWENS, an Idiot.

*Appointment of committee of the person and estate of an idiot.*

It is not irregular to appoint a stranger the committee of the person and estate of an idiot or lunatic, without notifying those who, as next of kin, will succeed the idiot or lunatic as heir.

*See case of Sarah Ann Suttie in this Court.*  
*General Term, April, 1874.*

APPEAL from an order at special term, denying an application made by Sarah Ann Suttie, a sister of the idiot, to set aside an order of this court appointing Nathaniel Jarvis, Jr., committee of the person and estate of the above-named idiot.

*Coles Morris & Michael H. Cardozo*, counsel for appellant.

By an order of this court, made on the 27th day of May, 1873, Ann Eliza Owens was adjudged an idiot, and Nathaniel Jarvis, Jr., Esq., was appointed the committee of her person and estate.

F. Owens, the father of said idiot, by his last will and testament, devised to his wife, Ann Owens, a life estate in all the property of which he died seized, and at her death he directed the same to be divided in such manner as that his said daughter Ann Eliza should receive three-fourths, and his daughter Sarah A., now the wife of William J. Suttie, one-fourth thereof.

Mrs. Suttie received no notice whatever of the execution of any commission to inquire of the idiocy of her sister, or of

---

In the Matter of Owens.

---

any of the proceedings herein. She never consented to the appointment of Mr. Jarvis as the committee of the estate and person of her sister, and did not know of the same or of any motion for that purpose until long after the entry of the order making such appointment, though she resides in the same house as her mother and the idiot.

The appellant charges that the foregoing proceedings were not taken in the interest of her sister, but solely for that of her mother, who is contriving and confederating with divers persons to procure a sale of her own and of the idiot's interest in the real estate for much less than its actual value, for the purpose of securing a larger interest therein than she is entitled to under the will. It also appears that the mother is an ignorant person, being unable to read or write.

Mrs. Suttie is able and always has been, and is now willing to take care of her crippled sister without charge or expense to her.

*First.* The order is appealable (§ 1, *ch.* 270, *p.* 592, *Laws of 1854*).

*Second.* The appointment of a stranger as the committee of the estate and person of an idiot, without the request of the relatives and next of kin of the idiot, and without a reference, and without notice to persons prospectively interested in the estate, is irregular and unauthorized by the practice of the courts having jurisdiction of such matters (*Lamoree's case*, 11 *Abb. Pr. R. [O. S.]*, *p.* 274; *ex parte Le Heup*, 18 *Ves., Jun., Ch. R.*, *p.* 221; *Van Santvoord's Eq. Prac.*, vol. 2, *p.* 368; *Re Meux*, 2 *Coo. t. Cott*, 106, 107, *n.*; *Phillips on Lunacy*, *p.* 274; *Shelford on Lunacy*, *Law Library*, *p.* 84).

*Third.* The heir, or a person having an interest in the estate, or a relative of the person of unsound mind, is generally preferred to a stranger in such committeehip (*Phillips on Lunacy*, *pp.* 278, 281, and *authorities there cited*; *Shelford on Lunacy*, vol. 2 of *Law Library*, *p.* 88; *Stock on Non Compos Mentis*, vol. 25 of *Law Library*, *p.* 71).



---

In the Matter of Owens.

---

*Fourth.* A female is always preferred as the committee of the person of an insane unmarried female (*Phillips on Lunacy*, p. 279; *ex parte Ludlow*, 2 P. Wms., 638).

*Fifth.* The wishes of the person *non compos mentis* always have weight; even unfounded prejudices are not disregarded (*Phillips on Lunacy*, p. 279, and cases there cited).

*Sixth.* The old rule which excluded, as a matter of course, the next of kin from the office of the committee of the person, whenever such next of kin was also heir to the idiot's estate, has long been exploded, as being unsuited to any but the most barbarous times (*Dormer's Case*, 2 P. Wms., 263; *ex parte Ludlow*, *id.*, 638; *ex parte Cockayne*, 7 Ves., Jun., Ch. R., 591; *In the matter of Livingston*, 1 John. Ch. R., p. 436, Kent, Ch.).

*Seventh.* The "next heir," even when the old rule did prevail, was given the preference as committee of the estate of the idiot, it being clearly his interest, by good management, to keep the estate in good condition, accountable always to the proper court (*Blackst. Comm.*, vol. 1, p. 305).

*Eighth.* The real estate of the late Francis Owens, upon the death of Ann Eliza Owens, the idiot, will descend in fee to Sarah Ann Suttie, the sister of said idiot, subject only to the life estate of their mother, Ann Owens (1 R. S., p. 751, § 6).

*Ninth.* It is true that the mother did consent to the appointment of this committee; but fraud and improper conduct are alleged against her, and though she denies these charges, and her denial, so far as regards this motion, is conclusive, still they may, nevertheless, be true; and their truth might and would have been proved if the reference usual in such proceedings, with notice thereof to Mrs. Suttie, had been directed. The ends of justice, therefore, demand, and the conscience of a court of equity will be better satisfied by a reversal of so much of this order as is appealed from, thereby giving this appellant an opportunity of proving the truth of those charges, especially as by so doing no injury will accrue to any one.

---

In the Matter of Owens.

---

*Tenth.* It cannot be urged as an objection to this appeal that the grounds of the motion were not sufficiently pointed out in the order to show cause, for they were fully stated in the moving affidavits, and distinctly sought to be met by the opposing affidavits, and actually discussed in the court below (*Livermore* agt. *Bainbridge*, 14 *Abb. Pr. R. [N. S.]*, p. 227).

*E. J. Pattison & Charles M. Marsh*, counsel for respondent.

The fact of idiocy is conceded, and there is no application to set aside any of the proceedings which judicially declared such to be the fact.

This committee was appointed on the application of the mother of the idiot, she desiring the appointment of Mr. Jarvis.

The motion to set aside the appointment was made by the only sister of the idiot, who, upon its death, would be entitled to all its property.

The proceedings in idiocy were without notice to this sister, and the committee was appointed without her knowledge or acquiescence.

It appears from the papers that the idiocy is extreme, so that the idiot is totally unable to take care of or even to feed herself, and has no use of her lower limbs.

That during its life it has been in charge of its mother.

It appears that this mother is unable to write, and all the papers are simply signed with her cross.

It further appears that the applicant, Sarah Ann Suttie, is a married woman, is in weak health, and has not the necessary strength to take care of her sister, the idiot.

*First.* The fact of idiocy once judicially determined, the entire proceedings necessary for the care and custody of the lunatic are left to the discretion of the court.

1. The statute provides:

---

In the Matter of Owens.

---

The chancellor shall have the care and custody of all idiots, lunatics, persons of unsound mind, and persons who shall be incapable of conducting their own affairs in consequence of habitual drunkenness, and of their real and personal estates, so that the same shall not be wasted or destroyed; and shall provide for their safe keeping and maintenance, and for the maintenance of their families, and the education of their children, out of their personal estates, and the rents and profits of their real estates, respectively (2 *Ed. Stats.*, p. 53).

2. By the constitution of 1846, the powers of the chancellor and his court were vested in the supreme court (*Con.*, art. 6; *Sherman* agt. *Felt*, 2 *N. Y.*, 186).

3. This jurisdiction was given to the county courts (*Code*, § 30), and was, in common with the other powers of those courts, conferred upon the court of common pleas (*Laws of 1854*, p. 464).

*Second.* There is neither statute or rule to be found requiring any particular course to be adopted on appointment of committee. The course of proceeding is left entirely in the conscience of the court.

*Third.* The proceedings, therefore, are not appealable.

1. There being no particular practice prescribed, there can be no *irregularity*, and, if there could be, no irregularity is specified in the order to show cause, as required by rule 46.

2. The matter being left in the discretion of the judge who appointed the committee, his decision is not appealable (*In re Griffin*, 5 *Abb. Pr.* [*N. S.*], 96).

*Fourth.* If there be any review possible, it can be only upon the ground suggested in the case of *Lamoree* (11 *Abb.*, 274), *i. e.*, gross abuse of judicial discretion in the court below.

There has been no such abuse in this case.

1. The proper party in the first instance was the mother. She was the nearest relative, and to her the estate could not possibly descend, and was, therefore, in every respect the proper party.



---

In the Matter of Owens.

---

2. But the mother declined to act, and in view of her ignorance it was manifest it was not desirable she should have the custody of the property. The rights of the idiot in the property are such, that it cannot bear the burden of two committees. The mother, therefore, asks the court to appoint its clerk the committee, that the property may be protected, and she remain undisturbed in the custody of her child.

So far is this from being a gross abuse of discretion, that, on the contrary, it is the most just and beneficent disposition the court could make of the matter.

3. Who is it claimed should have been appointed committee? It is the sister of the idiot, and its next heir.

(a) Under the old chancery practice, the next heir of an idiot was ineligible as a committee of the person (1 *Blackstone's Com.*, 305; *ex parte Ludlow*, 2 *P. Wms.*, 638).

(b) Although this rule has been departed from in this state to such an extent as to allow the heir, under some circumstances, to be appointed, yet it never can be called a gross abuse of discretion to refuse to appoint to an office a person whose relations are such that the courts for centuries held him ineligible.

(c) In this case, however, the moving party was a married woman, with the cares of her own family upon her, under the control of her husband, in such feeble health as to need care herself, and totally unable to bestow the necessary care upon the idiot. Her husband, a mechanic, dependent upon his daily labor for his bread; herself in that delicate health which renders it irksome, if not impossible, to bestow the necessary attentions to one utterly helpless; nothing but this helpless idiot between herself and a handsome property, the possession of which would give her those luxuries which are almost necessities to the sick; it was clearly a case to apply the old rule that the heir could not be committee, and even were there no mother or other relation, it would have almost

---

In the Matter of Owens.

---

amounted to a gross abuse of discretion to have appointed the appellant.

*Fifth.* The principle which governed in the case of Lamoree, above mentioned, is wanting here. There the ground of the reversal was, that the appointment of a stranger against the wishes of the heirs was an unwarranted intrusion into the sanctity of the family. Here, however, that member of the family who was nearest to the idiot, who would necessarily be thrown most with the committee, herself requests the court to appoint its clerk.

Can it be possible that a mother who has devoted her life to her helpless child, caring for it in a manner that left no room for even a charge against her, need state more plainly to the court the fears which she entertains, should the custody of this idiot be given to the one person interested in its death.

*Sixth.* The order appealed from must be affirmed.

DALY, C. J.—This is an appeal from an order denying a motion to vacate an order appointing Nathaniel Jarvis, Jr., the committee of the estate of the idiot, upon the ground that the idiot's sister, Sarah A. Suttie, who is a tenant in common with the idiot, of real estate under the will of their father, had no notice of the proceedings by which Mr. Jarvis, upon the consent of the idiot's mother, was appointed committee of the person and estate, or of the proceedings by which Ann Eliza Owens was found to be an idiot.

It is not denied but that she is an idiot, nor is the finding of the inquisition by which she was so declared questioned. It is insisted, however, that it was irregular to appoint a stranger the committee of her person and estate without notice to the sister, who is a tenant in common with her in the reversionary estate, and who, in the event of the idiot's death, would, if surviving, be her heir.

I know of no authority, and none has been referred to, holding that it is irregular to appoint a stranger the com-

---

In the Matter of Owens.

---

mittee of the person and estate of an idiot or lunatic, without notifying those who, as next of kin, will succeed the idiot or lunatic as heir. Judge BROWN held very properly, in *Lamoree's Case* (11 Abb., p. 274), that an order appointing a stranger the committee of a lunatic, where the next of kin did not assent or unite in the petition, was improvidently granted. But that is not this case.

The mother of the idiot, who is her next of kin, instituted the proceedings by which her daughter was declared *non compos mentis*. It was upon her petition that the proceedings were founded; and it was at her request and upon her written consent that the court appointed Mr. Jarvis the committee. Judge BROWN says that if the next of kin do not assent or unite in the petition, there should be an order of reference, of which they should have notice, that they may have an opportunity to propose themselves as the committee; in all of which I fully concur; but here the next of kin, the mother, did assent. I also recognize the propriety, to prevent abuses, of notifying those relatives who may succeed as next of kin of the proceedings, that they may have the opportunity of proposing themselves as the committee; for, although it is not a matter of course to commit the guardianship of the estate of an idiot or lunatic to those who are presumptively entitled to it upon the idiot or lunatic's death (*Matter of Taylor*, 9 Paige, 611), they may, under certain circumstances, be regarded as the proper persons to whom to commit the custody of the estate, as those who are most likely to protect it from injury or loss. If we had nothing before us upon this appeal but the fact of the appointment of a stranger, without notice to the sister, who, if she survives her mother and the idiot, will inherit the whole of the estate, I should, in view of the possibility of abuse, hesitate to affirm the order. But, looking at all the facts which were before the judge and are before us upon this appeal, I think he did right in denying the motion.

F. Owens, by his will, left all his property, real and per-



---

In the Matter of Owens.

---

sonal, to his wife, the mother of the idiot and of her sister, during her, the wife's, natural life; and upon her death he directed that it should be divided between his two daughters—three-quarters of the whole to the idiot, and the remaining one-quarter to her sister, Mrs. Suttie. The idiot is now twenty-four years of age. She has been entirely helpless from her birth, and the mother has, at her own expense, continuously taken care of the helpless creature from her infancy. The sister, Mrs. Suttie, has no property, except the household furniture given her by her mother and the interest before referred to in her father's estate, after the death of her mother, and her husband is a man of small means, depending upon his labor as a jeweler for his support. She is also a person physically weak, at all times in bad health, from time to time requiring the care of her mother, and has not sufficient strength to take the necessary care and charge of her sister, who requires *constant personal care and attention*. It is in view of these circumstances, and of the event, as the mother states, that she may herself be taken away by death, that she sought, by this proceeding, to provide that her helpless offspring might be left in the care of a competent and fit person who would conscientiously look after her interest, comfort and welfare; and it was in this view and with this assurance that she petitioned the court for the appointment of a committee and filed her written consent that the clerk of the court, Mr. Jarvis, might be appointed. No objection is taken as to the propriety or fitness of the selection of Mr. Jarvis. Any objection to him personally was disclaimed upon the argument; the objection being to the appointment of any stranger in preference to the sister, or without notice to her of the proceeding. There being no objection to Mr. Jarvis personally, her motion to vacate the order appointing him, it must be assumed, was made with the intention of proposing herself to the court as the proper person to be appointed the committee of her sister's person and estate.

She says in her affidavit that her mother kept all the pro-

---

In the Matter of Owens.

---

ceedings in the matter secret from her, and that she had no knowledge of the inquisition or of any of the proceedings anterior to the appointment of Mr. Jarvis; that the proceedings were not for the interest of her sister; but that her mother is confederating with others to procure a sale of a portion of hers and her sister's estate at a sum much less than the real value of it, with the object of dividing up the proceeds of the sale in such a manner as to secure to her mother a larger interest than she would otherwise have in the will.

The mother's affidavit is a complete and satisfactory answer to this charge; a considerable portion of it has been already stated, in addition to which it appears by it that her husband left by his will two houses—one in Eighty-first street, where she and Mrs. Suttie reside, and one in Wooster street; that the rent of the Wooster-street house is \$1,000 per annum, nearly one-half of which is consumed in the payment of taxes and other expenses; that the building is dilapidated and nearly worthless, and is used by the tenant for a carpenter's shop, whilst the lot could be sold for \$23,000, which explains the heavy tax upon premises yielding, in consequence of the dilapidated building that is upon them, so small an income; that the rent derived from that and such portions of the house in Eighty-first street as can be rented are all that she has, and that it is with difficulty that she can support herself and her idiot child; that both of these houses were bought with her own money, the savings of many years of hard labor and a very trifling assistance from her husband; and that, when purchased, the title was, upon her suggestion, taken in her husband's name, and that she does desire that a portion of the real estate should be sold, believing it to be for the common interest of all parties, which is certainly true in respect to the Wooster-street lot, which, if sold for its alleged value, would yield a fund, the income of which, properly invested, would be nearly double the amount of what is now derived from the premises. These facts need no comment. They

---

In the Matter of Owens.

---

show that what the mother has done and wishes to have done is founded in an intelligent view of the circumstances, and the due care in the future of her invalid child.

So far from seeing in the circumstances any reason why this order should be set aside, this daughter might be made the committee of the person and estate of her idiot sister, they show that she would be an unfit person to be intrusted with the charge, either of the person or of the estate. I had occasion, in the matter of *Bomanjee Byramjee Colab* (3 *Daly*, 529), to examine very carefully the nature of the peculiar jurisdiction exercised in the appointment of a committee to take charge of the person and estate of a lunatic, and pointed out, upon the authorities there quoted, that care has always been taken not to intrust the custody of the person or estate to those who may be pecuniarily benefited by the lunatic's death, or whose interest it is to keep his property from diminishing. Unless the court is satisfied that it would be to his advantage that those who stand in the relation to him of blood and natural affection should have the custody and care of him, and that, as respects his estate, the governing principle in its management is his interest, and not that of those who may have eventual rights of succession (*Eunice Saulsbury's Case*, 3 *John. C.*, 347).

Acting upon this rule it would not, in my judgment, be for the idiot's interest that the sister should be the committee of the person or of the estate, so far as respects the care of the person.

Mr. Jarvis, as was said in *Justice Dormer's Case* (2 *P. Wms.*, 263), is but a nominal person, as the idiot will, as long as her mother lives, be in the charge of the parent who has hitherto supported and taken care of her, and, as respects the property, it cannot be disposed of without the concurrence of the court; and as the order below has provided that the sister shall have notice of all further proceedings, she will have the opportunity of appearing before the court and objecting to anything proposed to be done which may affect injuriously her own or



---

In the Matter of Owens.

---

the idiot's interest in the property. No good end, that we can see, would be promoted by disturbing the present state of things. The only object could be to transfer the custody of the idiot from her mother to that of her sister, and, as respects the estate, to intrust the sister with the care and management of it. Neither of which would be, in my opinion, to the benefit of the idiot.

At least, nothing has been disclosed that shows that it would be for her interest. The order should be affirmed.

---

In the Matter of Tweed.

---

## SUPREME COURT.

IN THE MATTER OF THE APPLICATION OF WILLIAM M. TWEED  
FOR A MANDAMUS AGAINST NOAH DAVIS, A JUSTICE OF THE  
SUPREME COURT.

*Mandamus — exceptions.*

A *mandamus* will not be issued against a judge, commanding him to settle a bill of exceptions in a particular manner, when, as to the manner, there is a dispute.

The justice who presides at the trial must say whether or not an exception was taken, and his return is controlling until further proceedings.

*New York General Term, May, 1874.*

BRADY, J.—The rule established by the cases upon applications kindred to this is that a *mandamus* will be ordered commanding a judge to sign a bill of exceptions, but not to settle it in a particular manner when there is a dispute as to the incidents of the trial. The justice who presided must say whether or not an exception was taken, and his return is controlling, at least until further proceedings. If the return is alleged to be false, the suggestive remedy is by action (*People* agt. *Judges of Washington*, 1 *Caines*, 511; *People* agt. *Judges Common Pleas*, 2 *Caines*, 97; *People* agt. *Judges Westchester*, 2 *John. Cases*, 118; *Fists* agt. *Weatherwax*, 2 *John. Cases*, 215; *Sikes* agt. *Ransom*, 6 *John. Rep.*, 279; *People* agt. *Sessions*, *Wayne Co.*, 15 *How.*, 393; *Tidd's Pr.*, 903; *Delavan* agt. *Boardman*, 5 *Wend.*, 132), but whether such a remedy in fact exists, *quere* (*See Weaver* agt. *Deven-dorf*, 3 *Denio*, 120).

In England, according to Tidd (*supra*), if the alternative writ contain the surmise of an exception taken and overruled,

---

In the Matter of Tweed.

---

the command is to sign the bill *quod si ita est* (if it be so). But if the judge returns *quod non ita est* (it is not so), an action lies at the instance of the aggrieved party. If he establish the falsity of the return he recovers damages, and the peremptory mandamus goes forth, because the jury have declared that the exception was taken.

In this state, in one case, it was said that a referee would be compelled by mandamus to settle a case, and to settle it correctly (*The People* agt. *Baker*, 35 *Barbour*, 105); but the writ was not issued, owing to some informality in the proceedings. The decision was made at a special term, and is predicated of the cases in 1 *Caines*, 6 *Johnson* and 5 *Wendell* (*supra*). But an examination of these cases shows that the proposition asserted is not warranted by them, and the case stands alone. I have not found any case in which it has been declared that a mandamus would be issued against a judge commanding him to settle a bill of exceptions in a particular manner, when, as to the manner, there was a dispute. There were no authorities to that effect cited on the argument. In this matter there is a dispute as to the correctness of the bill, as passed upon by the presiding justice, in reference to exceptions; and he certifies that it is correct, although, having directed it to be engrossed, it has not yet been presented for his signature. There seems to be a concession that an exception was taken to the exclusion of the juror, Hayes, upon a challenge to the favor, but the presiding justice certifies that he was excluded for mental incompetency, and it was so understood. Upon a careful examination, not only of the authorities but of the application, I have arrived at the conclusion, for the reason assigned and those presented by justices DANIELS and WESTBROOK, that the mandamus asked for should not be granted.



---

Pacific Mail Steamship Co. agt. Com'rs of Taxes and Assessments.

---

## SUPREME COURT.

THE PEOPLE *ex rel.* THE PACIFIC MAIL STEAMSHIP COMPANY  
agt. THE COMMISSIONERS OF TAXES AND ASSESSMENTS OF  
THE CITY AND COUNTY OF NEW YORK.

*Steamship company — steamships — at sea — where taxable.*

A steamship company, incorporated under the laws of this state, having their principal place of business in the city of New York,—as a corporation their *residence* is in New York.

Where their ships are registered at the port of New York under and pursuant to the United States registry act, the city of New York is their home port. They have and can have no other, and are *taxable here only*. Their *situs* is at the home port for all purposes of taxation, although they may be permanently engaged in commerce and business on the Pacific ocean.

THIS writ of *certiorari* is issued to bring before the court for review the action of the tax commissioners in correcting their assessment upon the capital stock of the relator.

*Coles Morris & Michael H. Cardozo*, counsel for relators.

*First.* The order of this court, under which the commissioners acted in this matter, directed them to deduct from the previous assessment against the relators the value of their personal property situated *out* of the state.

This gave the commissioners no power to determine that any portion of such personal property, which was *actually* situated out of the state, was *constructively* situated *within* the state, for the purposes of assessment and taxation. They set up, themselves, in their return to this writ, that their board had no power, *at that period* of time (January 8, 1874), to review any assessment for the year 1873, "except as

---

Pacific Mail Steamship Co. agt. Com'rs of Taxes and Assessments.

---

expressly ordered by competent authority." They were *functi officio*, as to all their original powers, in the premises, and could only act under the special directions contained in this order. Besides, this question was disposed of by the court that made the order. INGRAHAM, P. J., delivering the opinion of the court, which was concurred in by both of his associates, says: "The proof shows that the greater portion of the personal property of the company was permanently located without the state of New York; that the ships are used exclusively in the navigation of the Pacific ocean, and never touch at any port in this state. I am of the opinion that this property comes within the exemption of the statute" (*See Report of the case, 1 N. Y. Supreme C. R., 613*).

The commissioners had a right of appeal from this order, if they had deemed it erroneous, but, when they undertook to act under it, they were bound to obey it literally.

*Second.* But if the commissioners *had* power to determine this question, then they erred in their decision, that such of the vessels described in schedule "D," annexed to the deposition of Mr. Bellows, as have their home port and are registered at the port of New York were to be deemed property of the relators *within* this state, for the purposes of assessment and taxation.

The proof shows that the place of business of the Pacific Mail Steamship Company, in this city, is intended and used only for the purpose of the general management of its affairs, the meetings of its stockholders and board of directors, and the keeping of its general accounts and records; and that the objects of the incorporation of the company require that the greater part of its operations shall be, and that they always have been, transacted at places and ports on the Pacific ocean.

These operations are conducted solely by means of the vessels in question, which were all sent from this port, or purchased on the Pacific coast, by the relators prior to November, 1872, *for permanent employment in their Pacific*

---

Pacific Mail Steamship Co. agt. Com'rs of Taxes and Assessments.

---

trade, and have remained there ever since, most of them having been employed since the year 1868.

All of these vessels which were sent to the Pacific ocean from this port are registered here. The rest were purchased by the relators on the Pacific coast, and are registered there (*See Morgan agt. Parham, 16 Wallace R., p. 471.*)

It has been settled by the court of appeals, in the case of *The People ex rel. Hoyt agt. Commissioners of Taxes, &c.* (23 *N. Y. R.*, 224), that, under this statute, property which is *visible and tangible*, so as to be capable of a *situs* away from its owner or his domicile, *must be actually within the state, or there is no right to tax it at all.*

And the principle of that case has since been extended even to such *intangibilities* as moneys invested by a resident of this state in loans in other states, upon securities taken and held in those states by his agents (*People ex rel. Jefferson agt. Gardner, 51 Barb. S. C. R., p. 352. See also Catlin agt. Hall, 21 Verm. R., 152, which was commented on and approved by the court of appeals, in Hoyt agt. Commrs. of Taxes, &c., ubi supra; see case of St. Louis agt. Wiggins Ferry Company, 40 Mo. R., 580.*)

It is no argument in support of the proposition contended for on behalf of the respondents, that unless these vessels are taxable here they are taxable nowhere. They are not the only species of property similarly circumstanced. Take, for instance, the case of capital belonging to a resident of this state, and invested in a mortgage on real estate in New Jersey, which is held by his agent in that state. This, as we have seen (*People ex rel. Jefferson agt. Gardner, ubi supra*), is not taxable here, and, by the laws of New Jersey, it is not taxable there.

It follows, from the foregoing considerations, that the relators are entitled to the deduction claimed of the aggregate value of all the vessels described in schedule D, annexed to the deposition of F. W. G. Bellows, which are registered at



---

Pacific Mail Steamship Co. agt. Com'rs of Taxes and Assessments.

---

the port of New York, and that the respondents erred in refusing to make such deduction.

*Third.* The commissioners also erred in their finding that the relators did not own the steamers described in schedule F, annexed to the deposition of F. W. G. Bellows, which were in process of construction out of this state, and in refusing to allow the relators the deduction claimed of the aggregate amount which they had paid on account of such steamers.

The proof on behalf of the relators shows that they were entitled to or interested in these steamers to the extent of the actual sums of money which had been paid by them on account of the same respectively, amounting in the aggregate to the sum of \$1,972,260.

*Fourth.* It will, doubtless, be urged, on the part of the respondents, that the effect of granting the entire relief claimed by the relators may be to wipe out the whole of the assessment against them. That is no reason why such relief should not be granted. The respondents should have appealed from the order, the faithful execution of which, on their part, would lead to such a result, if they deemed it erroneous, or they should have accepted the option allowed them by said order, of confining their assessment to the amount of the personal property of the relators for which they admitted their liability to be taxed, and which is described in schedule C, annexed to the deposition of Mr. Bellows, and therein valued at \$1,737,371.

*Fifth.* It should, therefore, be referred back to the respondents to correct the assessment which, in pursuance of said order, they made against the relators on the 8th day of January, 1874, and amounting to the sum of \$4,067,065, by deducting therefrom, first, the aggregate value as shown in schedule D, annexed to the deposition of F. W. G. Bellows, of all the vessels described in said schedule, except those described in the resolution adopted at the meeting of the said respondents, on said last-mentioned day; and, second, the

---

Pacific Mail Steamship Co. agt. Com'rs of Taxes and Assessments.

---

sum of \$1,972,260, being the aggregate amount of the payments made by the relators on the vessels described in schedule F of said deposition.

*Sixth.* This court acquired jurisdiction of this matter when the first writ of *certiorari* issued by it was served on the commissioners, on the 30th day of June, 1873 (*Laws of 1859, ch. 302, § 20*). This arrested the assessment rolls in the commissioners' hands and stayed all proceedings upon them. (*The People agt. Reddy, 43 Barb., p. 545*). The jurisdiction of the court continues to operate until its judgment upon said writ has been fully executed.

*E. Delafield Smith*, counsel to the corporation.

*James C. Carter*, counsel for respondents.

*First.* Ships, whose home is on the high seas, can have, of course, no *actual situs* within the territory of any state. In order to determine what their *situs* is, for the purposes of assessment and taxation, resort must be had to other considerations.

Plainly, it is either in the state where the owner resides or in that in which the *home port*, that is, the port of registry, is situated. Both these circumstances, in the present case, point out the state of New York as the *situs* (*The People ex rel. Hoyt agt. The Commissioners of Taxes, 23 N. Y., 224; The People ex rel. The U. S. and Brazil Steamship Company agt. The Commissioners, 48 Barb., 157*).

*Second.* It is the law in this country that the title to a vessel which one is building for another remains in the builder until delivery, unless an agreement to the contrary be shown. Such contrary agreement was not shown (1 *Parsons on Maritime Law, 74 et seq., and notes; Merritt agt. Johnson, 7 Johns., 473; Andrews agt. Durant, 7 Kern., 35*).

*Third.* The commissioners had no power to reopen their decision and grant a rehearing.

They are statutory officers, and have such power only as the

---

Pacific Mail Steamship Co. agt. Com'rs of Taxes and Assessments.

---

statute gives them. Their *general* power to correct their own assessments, on the application of parties aggrieved, had, in this case, expired on the 30th day of June, 1873.

*Fourth.* But if the commissioners had the power to reopen their decision, the exercise of it was a matter resting in their discretion, which is not subject to review on a writ of *certiorari*. It is only where a party has been denied the benefit of a strictly *legal right* that he is entitled to relief.

DAVIS, *P. J.*—We think the proceedings of the commissioners should be affirmed, for the following reasons :

*First.* The relators are a corporation created by the laws of the state, and having their principal place of business in the city of New York. As a corporation their residence is in New York.

The ships included in the present assessment are registered at the port of New York, under and pursuant to the United States registry act, and the city of New York is their home port; they have and can have no other, and are not taxable elsewhere. Their *situs* is at the home port for all the purposes of taxation. In the case of *Morgan agt. Parham*, the supreme court of the United States have very emphatically settled these questions, and reaffirmed the case of *Hays agt. The Pacific Mail Steamship Company*, under which the relators escaped taxation on these or similar vessels in California (See *Morgan agt. Parham*, 16 *Wallace*, 471; *Hays agt. The Pacific Mail Steamship Company*, 17 *Howard*, 596).

But it is insisted that, under our statute, the property of the relators, to be taxable, must be physically *within* the territory of the state; and, therefore, it is not enough that its legal *situs* and ownership are here. We think this position not sound, for several reasons. Of course, ships at sea are not, in a strict sense, within the territory of the state in which they have their home port, but in legal contemplation they are themselves part of the territory (so to speak) of the



---

Pacific Mail Steamship Co. agt. Com'rs of Taxes and Assessments.

---

country of which their owners are citizens or subjects; and they retain all the rights that flow from that fact while engaged in commerce between foreign ports, for undefined periods, without any interval of return to the home port.

But it is not, perhaps, upon this ground that they are deemed within this state, when owned by citizens of the state, for the purposes of taxation. It is rather because of the peculiar character of the property, which, though it be used abroad in the business of the owner, does not blend with the business and commerce of any foreign state or territory. The business of the relators' ships in the Pacific is all the while a part of the business carried on in New York, under which the charter of the company, whence the general management and direction emanate, and to which point returns of all results are made. The ownership and nature of the business control to establish the home port where the corporation resides as the *situs* of the ships themselves, and in legal contemplation we think the vessels used in the business, which have their home port under the law at New York, are within the jurisdiction and territory of the state within the meaning of the general statute declaring what property is taxable.

But for the decisions of the court when this case was before under consideration, we should deem this an immaterial question.

The relators, under the statute of 1857 (*Laws of 1857, chap. 456*), are taxable only upon their *capital stock*, which is to be assessed at its actual value, with certain exceptions specifically named or referred to in the act.

The subject of taxation under this act is the capital stock of the company, and that is at all times *within the state*, although, for the purpose of conducting the business of the company, a portion of its capital may be invested in ships whose commerce is carried on in remote parts of the world. The question to which the commissioners were to look, under the law, was not the *locus* or *situs* of items of property

---

Pacific Mail Steamship Co. agt. Com'rs of Taxes and Assessments.

---

owned by the corporation, but of the company itself, and of its capital stock, and they are in New York, both in law and in fact.

It would require a *special exemption* by statute to authorize the commissioners, in determining the actual value of the capital stock of the company, to strike out the value of property used in the general business of the company and contributory to the actual value of the capital stock, because its use was outside the state and the articles of property were therefore not territorially *within* the state. We think nothing of that kind was in contemplation under the act of 1857, which intended to create a special system of taxation applicable to corporations, and, *sub modo*, to modify all previous general laws; but this is not, perhaps, an open question.

In respect to the money invested in building the ships in Delaware, nothing was shown before the determination of the commissioners to require them to treat the ships in process of building as the property of the company. Before the motion for rehearing, the commissioners had made and filed with the comptroller their certificate.

The application for rehearing came too late; but, if it did not, the refusal to rehear is not a subject of review on this application.

The proceedings should be affirmed.

DANIELS and WESTBROOK, JJ., concurred.

---

In the Matter of Clifton.

---

## SUPREME COURT.

IN THE MATTER OF THE APPLICATION OF JOSEPH CLIFTON  
FOR THE CUSTODY OF HIS CHILD, TERESA CLIFTON, *alias*  
SMALL.

*Custody of child — public institution — protection.*

Where a father places his daughter, thirteen years of age, there to remain, under the care of a woman of notorious character living in a house opposite his own dwelling, and of whose reputation he could have advised himself without trouble, his conduct justifies the presumption that he is indifferent as to the destination and employment of his child, and unfit to be trusted with her care and maintenance.

The law of the land is broad enough to protect children from the errors of delinquent parents, and will not fail, through its officers, to endeavor to prevent the injustice which would otherwise ensue. When a parent is derelict he becomes unworthy of the charge; his trust is forfeited and the law assumes it.

In this case the application of the father was denied, and the child ordered to be placed in the institution, "The Sheltering Arms," there to remain until the further order of the court.

*June, 1874.*

HABEAS CORPUS, *before* BRADY, J.

*W. F. Howe*, for the relator.

*J. T. Davenport*, for commissioner Gardner.

BRADY, J.—This proceeding does not involve any question of the conduct of commissioner Gardner in doing what he did to rescue Teresa Clifton, *alias* Small, as he claims and proves, from a den of infamy, a panel thief apartment, attended



---

In the Matter of Clifton.

---

by abandoned women for felonious purposes. It is but just, however, to him to say that he testified that the door of Mrs. Small's room was not broken open, but opened by her upon request or demand, and I have no doubt of the truth of that statement. It may also be said, without passing upon the legal responsibilities assumed by the act committed to accomplish the result, that, as the child was not taken from the custody of her father on the occasion, no wrong was done him, and he cannot complain that another did for him what he should have been swift to do, not only for himself but his child. She is now but thirteen years old, and has not, therefore, even in this period of fast development and early assumption of individual capacity, arrived at an age when she may be safely trusted to her own judgment and control. She required the watchful and considerate control of her parents, and it behooved her father, when she was placed at service, to see to it that she was not exposed to dangerous influences and bad examples. It was a duty which he owed, not only to the community, of which he is a member, but particularly to her, to guard her against associates which would tend to her ruin when he parted from her custody and placed her under the care of another. The evidence on this proceeding fully discloses that he has been grossly negligent in this respect. He placed his child and permitted her to remain with a woman of notorious character living in a house opposite his own dwelling, and of whose reputation he could have advised himself without trouble. Not only did he do that, after he had taken his child from the changed residence of Mrs. Small at night, but he consented that she should return to Mrs. Small, who took her to some place, whither, he says, he did not know. His conduct, indeed, justifies the presumption that he was indifferent as to her destination or employment. It is apparent, therefore, that he is unfit to be intrusted at present with her care and maintenance. She now requires vigilant attention and moral culture. It is a painful duty so to declare, but the obligation is freely met

---

In the Matter of Clifton.

---

and discharged without reluctance. The law of the land is broad enough to protect children from the errors of delinquent parents; and will not fail, through its officers, to endeavor to prevent the injustice which would otherwise ensue. Society demands that a child shall be saved from a life of shame, and the laws of God and man sustain the demand. When the parent is derelict he becomes unworthy of the charge; his trust is forfeited and the law assumes it. Terèsa has not, it is to be hoped, so far transgressed that she may not yet be saved, although she has yielded to bad example and pernicious influences. She is intelligent, modest in demeanor, and impressive in her quiet conduct and gentle manners. I entertain no doubt that she will readily receive proper instructions for her future, and yield to the influences of good example. In the hope of this result she will be placed in the institution, "The Sheltering Arms," there to remain until the further order of the court.

Order accordingly.

---

De Ronde agt. Olmsted.

---

## N. Y. COMMON PLEAS.

ELIJAH J. DE RONDE *et al.* agt. CHAS. OLMSTED *et al.**Mechanics' lien—contract with claimants—when lien attaches.*

Where there is no evidence at the trial to show that the defendant had an interest in the leasehold premises upon which a lien was claimed and judgment demanded, until after the contracts with the claimants were made, the defendant cannot be made liable.

*General Term, June, 1874.**F. Tillou*, for appellants.*C. P. Hoffman*, for respondents.

LARREMORE, *J.*—The plaintiffs were copartners in business, as carpenters and builders, and allege that, between November 4, 1870, and March 7, 1871, at the request of the defendant, Charles Olmsted, and in pursuance of an agreement to that effect, they performed labor and furnished materials in altering and repairing the building and premises No. 335 Spring street, in the city of New York, of which said defendant was then the owner, and for which he was indebted to them, on March 7, 1871, in the sum of \$1,640, and for which, on the 4th day of April, 1871, they duly filed, in the proper office, notice of a lien in pursuance of the statute.

Plaintiffs then demand judgment, directing a sale of all the right, title and interest of said defendant in said premises, at the time when said lien was filed or which he has since acquired, and also a personal judgment for any deficiency that might arise on such sale.



---

De Ronde, agt. Olmsted.

---

The defendant denies that any agreement was ever made with him, and avers that the labor and materials referred to were furnished under a contract therefor between said plaintiffs and one Cyrus Olmsted, and on his sole credit, and for which they had been paid on account by said Cyrus the sum of \$2,371.63, and which they had failed fully to perform according to the terms thereof.

The defendants, McManus and Murray, were subsequent lienors and filed notices of their respective liens April 4 and 11, 1871, and to which the same defense was interposed as in the case of the plaintiffs.

The defendant, Hazard, was made a party on account of an assignment of a leasehold interest of said premises to him, but said assignment was not recorded until after said liens were filed.

Judgment was rendered against the defendant, as prayed for, in favor of each of the lienors for the amount of their respective claims, from which the defendant appeals. Hazard has not appealed and is concluded by the judgment.

In order to charge the defendant or his leasehold interest with the claims in question, it must be affirmatively shown that the liens were acquired in pursuance of some contract made or ratified by said defendant as the owner of said premises or by his duly authorized agent (*Laws* 1863, § 1).

The evidence fails to establish this fact. The contracts in dispute were all entered into with Cyrus Olmsted; payments made thereon by him, which were received and accepted by the several claimants. He was in actual possession and occupation of the premises, and continued therein until March, 1871, when most of the work and materials for which this action is brought had been furnished.

That Cyrus acted as the agent of Charles was positively denied by each; nor could such inference be drawn from the facts proved.

Charles Olmsted had no interest in the leasehold which could be made the subject of a lien until the delivery to and

---

De Ronde agt. Olmsted.

---

acceptance by him, on or about March 1, 1871, of the lease thereof from Silas Olmsted.

The instrument took effect from the time of its delivery and not from its date (*Jackson* agt. *Schoonmaker*, 2 *John.*, 230; *Same* agt. *Bard*, 4 *id.*, 231; *Same* agt. *Phipps*, 12 *id.*, 418), and particularly where, as in this case, there was direct proof as to the time of the delivery (*Ellery* agt. *Metcalf*, 1 *Denio*, 323; *Harrison* agt. *Norton*, 16 *Barb.*, 264; *Costigan* agt. *Gould*, 5 *Denio*, 290).

Whatever suspicion may attach to the circumstances surrounding the negotiation for the new lease and the surrender of the old one, the uncontradicted and unimpeached testimony of the defendant and his son Cyrus upon this point must control the decision.

There being no evidence to sustain the findings of the referee, as to the defendant's ownership and liability at the time said contracts with the claimants were made, the judgment entered thereon should be set aside (*Draper* agt. *Stommel*, 38 *N. Y.*, 219; *Fellows* agt. *Northrop*, 39 *id.*, 117; *Mason* agt. *Lord*, 40 *id.*, 476; *Sheldon* agt. *Sheldon*, 51 *id.*, 354).

The judgment herein should be reversed, and a new trial ordered, with costs to abide the event.

ROBINSON, J., concurred.

---

Brennan agt. The Mayor, &c., of the City of N. Y.

---

SUPREME COURT.

JOHN BRENNAN agt. THE MAYOR, &C., OF THE CITY OF  
NEW YORK.

*Stare decisis.*

The doctrine of *stare decisis* is one of great importance, and should not be departed from in the administration of justice, except in extreme cases founded upon some change in the law, either by legislation or by courts of last resort, or when the court is satisfied that an erroneous conclusion has been declared. The plaintiff's appeal in this case falls within this rule.

APPEAL from a judgment against the plaintiff.

*Franklin Bartlett*, for appellant.

*A. J. Dean & E. D. Smith*, for respondent.

BRADY, J.—When this case was before the general term of this court on a former appeal, it was declared by the court that the act under which the plaintiff had been appointed was unconstitutional; and no appeal was taken from that decision. It was so determined because the act was local, and the subject, so far as it related to the appointment of officers of the courts of this city, including those for this court, was not expressed in its title. The point arose upon the act itself, which was construed as stated. The doctrine of *stare decisis* must, for these reasons, be applied. It is one of great importance in the administration of justice, and should not be departed from, except in extreme cases, founded upon some change in the law of the land, either by legislation or by



---

Brennan agt. The Mayor, &c., of the City of N. Y.

---

courts of last resort, or when the court is satisfied that an erroneous conclusion has been declared. "To depart from a decision is undoubtedly an act by which a court incurs a high degree of responsibility, and it should certainly be satisfied that its course is such that the future judgment of the enlightened profession of the law will approve its determination" (JOHNSON, *Ch. J.*, *Leavitt* agt. *Blatchford*, 17 *N. Y. R.*, 543, 544). Uniformity of rule in the discharge of judicial duty is, seemingly at least, almost indispensable, as well to the lawyer and the citizen as to the court. No system can approximate perfection, the principles of which, solemnly declared, are reviewed and modified or reversed without impelling reasons, such as suggested by the same tribunal which promulgated them.

There is no such consideration in this case, and the judgment should therefore be affirmed, with costs.

DAVIS, P. J., and DANIELS, J., concurred.

---

Tuton agt. Thayer.

---

## SUPREME COURT.

SAMUEL TUTON agt. WILLIAM THAYER.

*Guaranty of payment and collection of a note.*

A *guaranty* indorsed on a promissory note in the following words: "For value received I guarantee the payment and collection of the within note, with costs, if any made," held to be a guaranty both of payment and collection.

The holder has his election to proceed, in the first instance, either against the maker or against the guarantor, and if he does proceed against the former and fails to collect, he has his remedy against the latter, as well for the costs of the former action as for the debt.

*Monroe Special Term, August, 1873.*

THIS is an appeal from an order made by the Monroe special term on the 28th day of August, 1873, denying a motion made by the defendant for a new trial.

The cause was tried before justice DWIGHT and a jury at the Yates circuit, in November, 1872, and the plaintiff recovered a verdict for \$207.07.

The action was brought to recover on a guaranty executed by the defendant and delivered to the plaintiff of a note made by Joseph Thayer for \$150, payable to the defendant, or bearer. The guaranty was in these words:

"For value received I guarantee the payment and collection of the within note, with costs, if any made."

(Signed)

"WILLIAM THAYER."

---

Tuton agt. Thayer.

---

The only question to be presented is as to the construction that should be given to this guaranty, the defendant claiming it should be *limited* to one for collection solely.

*D. B. Prosser*, counsel for defendant and appellant.

I. The complaint does not contain facts sufficient to constitute a cause of action against the defendant; because,

1st. There is no allegation in the complaint when said note, guaranteed by the defendant, became due and payable.

Even if the defendant's undertaking could be construed as one of payment, no action could be sustained against the defendant until after the note had become due and payable.

2d. There is no allegation in the complaint that any attempt had been made to collect the same of the maker.

If the undertaking of the defendant was a guaranty of collection simply, it is clear that before the plaintiff could proceed against the defendant, the remedy against the maker must first have been exhausted, and which fact must be alleged in the complaint.

The fact that the complaint does not state facts sufficient to constitute a cause of action may be taken advantage of in any stage of the proceedings (*Code*, § 148).

II. The court erred in refusing to nonsuit the plaintiff, and in refusing to instruct the jury as requested by the defendant's counsel; because,

1st. The legal effect of the undertaking on the part of the defendant was a guaranty of the collection with costs, after due and proper proceedings had been taken to collect the note of the maker.

In construing the contract and agreement of parties, their intention is to control, if such intention appears upon the face of the agreement.

In the case now under consideration, it is manifest, from the wording of the guaranty, that it was the intention of the defendant to guarantee the collection with costs.



---

Tuton agt. Thayer.

---

If not paid by the maker at maturity, the design and intention was that legal proceedings should be had to enforce payment of the maker before resort could be had to the guarantor.

To construe the writing into a guaranty of payment would be to wholly reject the words, "*and collection with costs, if any made.*"

But it is said that it is both a guaranty of payment and collection, and that such a construction would give force to all the words employed. That it is either a guaranty of payment only, or a guaranty of collection only. This cannot be.

It certainly was not the intention to make a contract in the alternative. If that had been the intention, the conjunction "and" would not have been used. The word "or" would have been used, so as to read, *payment or collection, with costs*. If that had been the language, the holder would have had the right of election, to proceed in the first instance on the guaranty of payment, or against the maker; and in case he failed, he then would have had his remedy against the guarantor for the debt and costs.

In the case of *Baxter agt. Smack* (17 How. Pr. R., 183), the guaranty was indorsed upon the back of a bond, and, after stating the consideration, was in these words: "*I do hereby guarantee the payment and collection of the principal and interest money of the bond and mortgage within assigned.*"

ROOSEVELT, J., held the guaranty to be one of collection and not of payment. The learned judge, in his opinion, says: "Where the parties are careless in the use of language, it is to ascertain their intent. When ascertained, the intent, if not prohibited by some positive rule or statute, is the law. What, then, according to the common understanding, is the meaning of the terms, '*payment and collection,*' and in connection with the mortgage about to be assigned? If, on mere non-payment, it was intended that the guarantor should be immediately liable to a suit, no matter how ample the

---

Tuton agt. Thayer.

---

value of the mortgaged premises, why superadd the word 'collection' to the word 'payment?' The use of that word clearly shows that the corresponding idea, in some form, was in the mind of the party. I can conceive of no other motive for its insertion than to signify distinctly that if not paid at maturity the loan should be 'collectible' by foreclosure, or, in other words, that it would be 'paid' if the usual steps were taken for its 'collection.'

"This interpretation gives some force to all parts of the sentence, whereas the other renders the term '*collection*' a mere nullity."

It is true this is a special term decision. It was rendered in 1859, and has never been questioned until in the present case.

The guaranty is a special contract, and must be construed by the same rules as all other special agreements.

The order appealed from should be reversed, and a new trial granted, with costs to abide the event.

*Charles S. Baker*, counsel for plaintiff and respondent.

The learned justice properly held that the guaranty should not be limited to one for *collection merely*.

1. The language employed does not make it such.
2. The language employed, unless restricted and changed from its usual and ordinary sense, embraces a guaranty of *payment* as well as *collection*.

3. Giving the words their fair and natural import, the defendant undertook and guaranteed both the payment and collection of the note.

4. The words, grammatically construed, admit of no other interpretation.

5. The sentence, when grammatically extended, would read: "For value received I guarantee the *payment* of the within note, with costs, if any made; and for value received I guarantee the *collection* of the within note, with costs, if any made."

---

Tuton agt. Thayer.

---

6. To permit the construction to be applied to the guaranty contended for by the defendant would defeat all the rules of interpretation to be given to contracts.

(a) The word "payment" would be left meaningless and redundant—in effect stricken out. That this is never done, except from necessity, is too clear to need any argument or authority. The words "with costs, if any made," would also be left in the same position.

In a simple guaranty of *collection*, the guarantor is liable for the costs incurred in endeavoring\* to collect against the maker of the note, without specifying the same in the guaranty (*Heywood* agt. *Heywood*, 42 *Maine R.*, 229; *Opinion DWIGHT, J., at special term*; *Mosher* agt. *Hotchkiss*, 3 *Keyes R.*, 161, *opinion*, 164).

But in a guaranty of payment, if the holder thereof resorts in the first instance to the *maker* and is unsuccessful, he cannot recover the costs incurred in an action against the guarantor on the guaranty (*Woodstock Bank* agt. *Downer*, 27 *Vermont R.*, 539, *opinion*, 544).

(b) If the guaranty is construed to be one of *payment* as well as *collection*, no violence need be done to the language, and effect and meaning are given to every word (*Opinion DWIGHT, J., at special term*).

(c) That in the construction of guaranties as favorable rules are to be applied as in other contracts, is now well settled, both in the court of last resort in this state, and in the supreme court of the United States (*Gates* agt. *McKee*, 13 *N. Y. R.*, 232, 234, 235, 236, 237, 238; *Douglas* agt. *Reynolds*, 7 *Peters*, 113, 122). The rule laid down in *Gates* agt. *McKee* is: "Guaranties are to be construed by rules at least as favorable to the creditor as those which courts apply to other written contracts, irrespective of the consideration that the guarantor is a surety" (*DENIO, J.*, 234, 235).

(d) Again, "The obligation of a guarantor is what the fair import of the language of guaranty imposes upon him. If his engagement is absolute, he cannot insist upon any con-



---

Tuton agt. Thayer.

---

dition" (*Simons* agt. *Steele*, 36 *New Hampshire R.*, 73; *Morris* agt. *Wadsworth*, 11 *Wendell*, 100; *S. C.*, 17; *id.*, 103).

7. Upon principle and analogous cases this guaranty should not be held to be one of collection solely. In *Curtiss* agt. *Smallman* (14 *Wend.*, 231), and *Cooke* agt. *Nathan* (16 *Barbour*, *S. C.*, 342), the guaranty was "that the note is 'good.'" The court held that the word "good" meant and should be held the same as "collectible," and therefore held that they were guaranties of collection. Yet in a well-considered case, where the guaranty was, "I guarantee the said note is good, and payment of the same," the court held that the holder of the guaranty was not bound to exhaust his remedy against the maker before resorting to the guaranty (*Woodstock Bank* agt. *Downer*, 27 *Vermont R.* [1 *Williams*], 539).

In legal effect there can be no difference between that case and this. Using a word of the same legal import cannot alter the *status* of the matter.

8. If the court should arrive at the conclusion that the language of the guaranty is ambiguous, the defendant will be no better off (*Opinion* DENIO, *J.*, *Gates* agt. *McKee*, p. 236, *cases cited*).

SUB. I, POINT I. It is only deemed necessary to particularly call the attention of the court to the opinion of justice DWIGHT, to show the fallacy of the reasoning of the judge who delivered the opinion in the case relied upon by the defendant's counsel to maintain his position (*Smack* agt. *Baxter*, 17 *How. P. R.*, 183). We are perfectly willing to submit the case to this court on the views presented by the two opinions as to the meaning of the language employed in this contract of guaranty, and we confidently submit that justice DWIGHT has given the meaning which the words of the contract naturally convey. And applying the language of judge DENIO, in *McKee* agt. *Gates* (*supra*, 234), "If this is the meaning which the paper naturally conveys, it is the sense which the court is bound to apply to it," we respectfully

---

Tuton agt. Thayer.

---

submit that no error has been committed by the court below, and the order should be affirmed, with costs.

DWIGHT, *J.*—This was an action on a contract of guaranty indorsed on a promissory note in the following words:

“For value received, I guarantee the payment and collection of the within note, with costs, if any made.

(Signed) WILLIAM THAYER.”

I held, at the circuit, that this was a guaranty of payment as well as of collection, and therefore denied a motion for a nonsuit made by defendant at the close of the plaintiff's case, no evidence being given of proceedings to collect of the maker of the note. The defendant's exception to the ruling denying the motion for a nonsuit presents the only question in the case. Counsel for defendant now cite the case of *Baxter agt. Smack* (17 *How.*, 183), where ROOSEVELT, *J.*, at special term, on demurrer, held a similar guaranty of a bond and mortgage, omitting only the words “with costs, if any made,” to be a guaranty of collection only, and sustained the demurrer to a complaint which did not allege proceedings previously had against the mortgagor. With great respect for the opinion of the learned judge who thus decided, I am unable to concur with him in his construction of the contract.

He says, “to construe it as a guaranty of payment renders the word ‘collection’ a mere nullity; whereas to construe it as a guaranty of collection gives some force to all parts of the sentence.”

I concede that to construe it as a guaranty of payment alone, renders the word “collection” superfluous; and it seems equally clear that to construe it as a guaranty of collection alone has the same effect in regard to the word “payment;” whereas to construe it as a guaranty both of payment and collection, gives force to all the language employed

---

Tuton agt. Thayer.

---

and an effect to the contract different from that either of a guaranty of payment only or of collection only.

Upon a guaranty of collection only the holder must proceed in the first instance against the maker, but, if he fails to collect of him, has his action against the guarantor, both for the debt and for the costs of the proceedings against the maker.

Upon a guaranty of payment only, the holder *may* proceed in the first instance against the maker; but if he does so, and subjects himself to costs, he cannot afterwards recover those costs of the guarantor, because he had his action in the first instance against the guarantor, and need not have incurred costs in an action against the maker.

But upon a guaranty both of payment and collection the holder has his election to proceed in the first instance either against the maker or against the guarantor, and if he does proceed against the former, and fails to collect, he has his remedy against the latter, as well for the costs of the former action as for the debt.

Certainly, if it had been the intention of the parties to this contract to give the holder such an election and such a remedy, no form of words could have been selected more apt and effective to express such intention than the form actually employed, viz.: "I guarantee the payment and collection of the within note, with costs, if any made."

It needs no argument to show that such a choice of remedy, with indemnity for costs to the extent of the guarantor's responsibility, might be of substantial advantage to the holder of the contract in many cases. For the reasons stated I am still of opinion that the contract was properly construed at the circuit.

The motion for a new trial must therefore be denied.

At the general term, fourth department, April, 1874, the order of the special term was affirmed, on the grounds stated in opinion of justice DWIGHT, the court adopting his opinion.

Justices MULLIN, E. D. SMITH and GILBERT.



---

Cooley agt. Decker.

---

## SUPREME COURT.

LEVI COOLEY and others, Respondents, agt. JONAH D.  
DECKER, Appellant.

*Referee's report made while in a foreign country — jurisdiction.*

Where a referee, under an order of the court, makes an amended report in the cause while sojourning in a foreign country (Switzerland), which is returned and filed here, it is not invalid for want of jurisdiction.

THIS is an appeal by the defendant from an order of special term, setting aside a report of a referee, upon the ground that the report was made outside of the jurisdiction of the court.

The appeal papers show that an issue was formed in this action, and that it was referred to D. Holmes, Esq., to hear and determine. On the 6th of June, 1873, he made his report, and caused it to be delivered to the plaintiff's attorneys, who filed the same, and gave defendant notice of the filing on the 24th of June, 1873. On the fourth of July the plaintiff excepted to this report. At the July special term the defendant, on notice, moved to have the report sent back to the referee for further findings. The motion was granted, whereupon the plaintiffs' counsel suggested that the referee was then in Europe, "and it would be a hardship for plaintiffs to have to wait till his return to obtain this corrected report from the referee, stating that it was his belief that defendant made this motion to obtain this delay, which referee's absence would occasion. The court answered that unless the parties agreed, they would have to wait till referee returned. If agreed, the counsel, Mr. Thomas, could send the papers and referee's testimony to him, and obtain the

---

Cooley agt. Decker.

---

corrected report from him, and, no doubt, defendant's counsel would consent that the plaintiffs' counsel might do this. Mr. Danforth, defendant's counsel, replied that Mr. Thomas, if he desired to do so, might send the papers to the referee, with his minutes of the testimony, wherever he could find him."

The defendant drafted an order, merely directing the report to be sent back to the referee, and submitted it to plaintiffs' attorney. He objected to the proposed order because it did not provide for sending the case to the referee wherever he could be found, and at his request the order was amended by adding permission to send "the evidence and papers to him wherever he could be found," and the plaintiffs' attorney caused the order to be entered, and sent it and the papers to the referee. The referee made a further report, while absent from the country, sent it to his clerk or partner Mr. Chickering; after some delay, the defendant took the report from Mr. Chickering and filed it. The plaintiff then filed and served exceptions to the report, and afterward made a motion to set aside the report for the reason that it was made out of the jurisdiction of the court. On the 28th of July, 1873, the motion was granted for the reason assigned, and from this order the defendant appeals to this court.

*George F. Danforth*, for appellant.

*First.*—Notwithstanding a report had been made by a referee, it was in the power of the court to require an amended report (*Brainerd agt. Dunning*, 30 *N. Y.*, 216; *Leffler agt. Field*, 50 *Barb.*, 413; *Rogers agt. Wheeler*, 52 *N. Y.* 262).

*Second.*—Although his absence from the state would prevent the use of compulsion, as suggested in *Peck agt. Yorks* (14 *How.*, 416), it would not interfere with a voluntary obedience to the direction of the court, and his act in so doing is valid.

---

Cooley agt. Decker.

---

*Third.*—But if otherwise, the plaintiff is estopped from objecting to the report upon the ground that it was made out of the state.

I. He caused the objectionable provision to be inserted in the order.

II. He procured the referee to execute the order.

III. He treated the amended report as regular, by excepting to some of its findings.

And having taken the chances of a report favorable to himself, should not be permitted to say that his own act was wrongful, and thus injure his adversary.

It is not a matter which concerns the public. It affects only the parties to the suit. They may waive the presence of the referee within the territorial limits of the state, as well as they can relieve him from the necessity of taking an oath.

A magistrate is required to take an official oath, but although this is omitted, a judgment rendered by him, without objection, is valid. And so as to arbitrators (4 *N. Y.*, 257; 1. *Denio*, 440). A jury trial may be waived, so the oath of a juror, and so of any omission or irregularity; it may be waived by the parties to the suit.

The act of the referee in signing his amended report out of the state, if objectionable at all, was a mere irregularity, and presents no question of jurisdiction.

The order of the special term should be reversed, with costs of special and general term.

*Thomas & Dean*, plaintiffs' attorneys.

From the papers in the case, used upon the motion, it appears that the action was one upon a building contract, and for extra work and materials; that the action was commenced February 4, 1873; that the same day the defendant appeared in person and the parties joined in executing a stipulation as to the amount due the plaintiffs.



---

Cooley agt. Decker.

---

An answer and reply in this case, were put in, February seventh and eighth, and February tenth an order of reference to Daniel Holmes, Esq., was entered by consent.

July 30th, 1873, the order at folio 15 was made, sending back the report "to the referee, *wherever he may be*," for correction and further finding; and staying proceedings meanwhile.

The amendatory report was made at Lausanne, Switzerland, September 13th, 1873; it changes the sum of \$216 to \$108, and finds the question as to quality in favor of the plaintiffs.

The report was set aside as void by justice JAMES C. SMITH, January 28th, 1874, on the ground that it was made out of the jurisdiction.

*First.* The report was properly set aside, independently of the ground upon which the court based its action.

Whether outside the state or within it, the referee has no right to review his own report, to reverse as "erroneous" a finding already made on mature consideration, and make a contradictory one instead. This is the province of an appellate court alone (*Goulard agt. Castillon*, 12 *Barb.*, 126; *Pratt agt. Stiles*, 17 *How. Pr. R.*, 211, 221, 222, 224; *S. C.*, 9 *Abb.*, 150).

Such procedure as has been adopted here must give rise to endless inconvenience and abuse. No better illustration of this can be desired than the letter of the referee to the defendant. After evidence is in, argument closed, and a mature decision rendered, the rights of one party are to be tossed about and finally resettled by means of a vivacious correspondence between the other party and the referee, or, if the latter happens to be near enough for personal approach, by equally lively and pleasant personal interviews. No imputation is intended upon the motives of this particular referee; but it is submitted that another and a better process for the review of his errors is provided by law.

*Second.* But the amendatory report actually rendered was wholly void, for the reason assigned by the court.

---

Cooley agt. Decker.

---

1. The act of the referee in making it is a *judicial act*, pure and simple.

2. No judicial act can be performed by an officer of this court out of its jurisdiction (*Bonner* agt. *McPhail*, 31 *Barb.*, 106, 112; *Peck* agt. *Yorks*, 14 *How. Pr.*, 416; *Brush* agt. *Mullany*, 12 *Abb. Pr.*, 344).

*Third.* The order appealed from is brought before this court, by the appeal, in all its aspects. It ought, therefore, to be not only affirmed, but, that a multiplicity of motions and appeals may be avoided, to be extended so as to set aside the order directing a further report. The remedy of the defendant, if there has indeed been error in it, is ample by exceptions and appeal from the judgment to be entered upon it.

At a general term of the supreme court, fourth judicial department, held at the city of Rochester, in the county of Monroe, April 30, 1874.

*Present*—HON. JOSEPH MULLIN, *Presiding Justice*.

E. DARWIN SMITH,

J. W. GILBERT, *Justices*.

LEVI COOLEY AND LEVI COOLEY, JR.,

Respondents,

agt.

JONAH D. DECKER, Appellant.

The appeal from the order of special term, entered January 28, 1874, setting aside the amended report of Daniel Holmes, Esq., referee herein, dated September 13, 1873, having come on to be heard.

Now, after hearing Mr. George F. Danforth, of counsel for said appellant, and Mr. Theodore Bacon, of counsel for said respondents, it is ordered that the said order of special term be and the same is, in all things, reversed, with ten dollars costs, to be paid by said respondents to said appellant's attorney.

(Copy.)

JOHN H. WILSON,

*Clerk.*

---

White agt. McLean.

---

## COMMISSION OF APPEALS.

ROBERT CORNELL WHITE, respondent, agt. ANDREW McLEAN,  
appellant.

*Closing the cross-examination of a witness by the judge — exceptions to charge.*

A judge at the trial has power of his own motion to close the *cross-examination* of a witness. And it will be held a wise discretion of the exercise of that power, where the judge orders the witness to leave the stand, after a large latitude has been given counsel, not only on direct cross-examination, but on recross-examination, to fully examine the witness, and after a suggestion from the judge that the subject has been exhausted, and the counsel reiterates again the same question which had been asked and answered several times.

Where counsel choose to rely on a *general exception* to the charge of the judge to the jury respecting the impeachment of a witness, stated, perhaps, in unguarded language, but other portions of the charge upon that question are correct, the exception cannot be sustained.

It is the duty of the counsel to call the attention of the judge specifically to that part of the charge which he considers objectionable, at the time it is made, and if not then corrected, a special exception should be taken.

*Before* LOTT, EARL, GRAY, REYNOLDS and DWIGHT, Commissioners.

APPEAL FROM a judgment and order refusing a new trial of the general term of the supreme court of the first judicial district, affirming a judgment rendered at circuit in favor of the plaintiff. The action was brought to recover the possession of personal property, of which the plaintiff claimed to be the owner.

The defendant set up in his answer that he was the owner of the property in question by virtue of an alleged purchase of it from one Joseph B. Sheridan, who was in possession of



---

White agt. McLean.

---

it at the time of the sale. He made payment for it partly by canceling an antecedent claim for rent of the premises in which the property, consisting of furniture, was at the time of the sale, and partly in cash.

The plaintiff's theory of the case was that the furniture had been selected by Sheridan for the plaintiff as owner, and that the latter paid for it and leased it to Sheridan, who, at the time of the sale, had no other title than that of lessee, and of course could convey none to the defendant.

The action was tried by a judge and jury. Much evidence was given by the respective parties at the trial to sustain the issues in the case.

One of the principal questions arising on this appeal concerns the right of the judge on the trial to stop the cross-examination of one of the witnesses. The facts are stated in the opinion. The testimony of Joseph B. Sheridan, one of the defendant's witnesses, having been taken in France under a commission, was read at the trial. The plaintiff produced six respectable witnesses who swore that Sheridan's character was bad, and that they would not believe him under oath. This impeaching testimony was not contradicted by the defendant.

The judge, in charging the jury, made some remarks on the subject of his impeachment, to which a general exception was taken. These are referred to in the opinion.

A verdict was rendered for the plaintiff and judgment accordingly. A motion for a new trial upon the exceptions was denied. An appeal from the judgment and order having been taken to the general term, and there having been affirmed, the defendant appeals to this court.

*L. S. Chatfield*, for appellant.

*D. McMahon*, for respondent.

DWIGHT, C.—The appellant in this case relies upon two errors alleged to have been committed at the trial. One of

---

White agt. McLean.

---

them concerns the right of a judge to stop the examination of a witness, while the other relates to the charge of the judge to the jury in respect to the impeachment of the testimony of another witness.

I. The principal question at the trial concerned the ownership of furniture which had been sold by one Sheridan to the defendant. The plaintiff maintained that the title was in himself, and that Sheridan's act was nugatory. To sustain this view the plaintiff was examined in his own behalf. He was subjected to a protracted cross-examination by the defendant, the report of which occupies nearly fifty folios. To this cross-examination there was no check, and wide latitude was taken in the questions asked. It was closed by the defendant, when the witness was again called by the plaintiff for direct examination. When that was closed there was an extended recross-examination. The question between the parties arises in this way: On the redirect-examination the plaintiff testified that he had bought the furniture in distinct parcels, and had paid for a number of them by separate checks. For two of the parcels he swore that he gave the money to Sheridan to make the necessary payments. One of the bills contained a small item for a pair of curtains. The court, on those cross-examinations, allowed ten questions on the subject of the curtains, running out into much detail.

The judge then said to the defendant's counsel: "You have exhausted the witness; you will never stop it, unless I stop it." The counsel, still persisting, asked the witness other questions concerning the curtains, when the judge told the witness to leave the stand. On the objection of counsel that they had not finished the examination the judge further said that he considered the cross-examination exhausted, and that he would close it. To this ruling the defendant excepted.

These facts present a question as to the power of a judge, of his own motion at the trial, to close a cross-examination. This question will first be considered on the supposition that this was an ordinary cross-examination, without reference to

---

White agt. McLean.

---

the special fact that the present case is that of a recross-examination. The importance of according to parties, to an ample extent, the right of cross-examination will not be denied. It is often the only successful method of eliciting truth from a captious, unwilling, or even forgetful witness. The questions to be asked vary so much with the intelligence, spirit, temper and memory of the witness, that they cannot be reduced to precise forms. From the necessity of the case the whole subject rests largely with the discretion of the court. A wise judge will err on the side of indulgence rather than of strictness, and permit questions to be asked touching the veracity, bias and temper of the witness, in deference to the views of cross-examining counsel, even though, from his own point of view, the examination may be unreasonably protracted. He will reflect that he cannot, in general, know so much of the case as counsel who has given it careful attention, and who has sources of information as to the position which the witness holds to the cause that are not accessible to himself.

This indulgence, however, has its limits. Were it not so, trials might be protracted to an extent prejudicial to the rights of the other suitors, and to the interests of the public at large. It is even conceivable that a close and minute cross-examination may be carried on solely to annoy a perfectly veracious witness, or to try, and perhaps overcome, the patience of a judge. The court must have the power to control the whole matter in the exercise of a sound discretion. If that discretion be abused, correction of the abuse must be sought in the appellate court. In the case of *Hunter agt. Kehoe, Ridgway Lapp* (5 *Schwabs*, 380), Lord CLOWNELL observed, as a general remark, that cross-examination had gone to an unreasonable length; and he had in general permitted gentlemen to go as far as they pleased, because, if there was an honest case on the other side, it would do them no good. This case is cited as law in 2 *Evans' Pothier*, 269; 2 *Starkie on Ev.*, 1739, note k (*Am. ed.*, 1836). This state-



---

White agt. McLean.

---

ment is a strong recognition of the right of the court, in its discretion, to check a cross-examination. This proposition is generally asserted by the text-writers on "evidence" (1 *Greenleaf on Evidence*, Redfield's ed., § 456; *A. Taylor on do.*, § 1291; *Phillips on Evidence*, Cowen & Hills Notes; *Commonwealth* agt. Sackett, 22 *Pickering*, 394; *Lawrence* agt. *Barker*, 5 *Wendell*, 301; *Turnpike Co.* agt. *Loomis*, 32 *N. Y.*, 127; *Grotten* agt. *Smith*, 33 *N. Y.*, 250; *Ray* agt. *Missouri*, 17 *Wallace*, *U. S.*, 532). This rule could not, in general, be so far extended as to exclude a question which was material to the issue (*Commonwealth* agt. *Sackett*, *supra*); though, even in that case, if all the material questions has been asked, and there was a needless repetition and waste of time, the same principle must be applied, and the exercise of a discretion allowed, subject to review in the case of abuse.

In the present case there was no abuse of discretion. The cross-examination had been very full. The witness had once been permitted to leave the stand. On the recross-examination the questions had been numerous; and to a particular question the witness had answered that he did not remember; and to a second question of the same general import he had given the same answer. The question was of no importance, except as testing the memory of witness. The judge then intimated that he should close the examination, whereupon the counsel asked the same question to which he had already received an answer. It was at this stage that the judge interfered and directed the witness to leave the stand. The fair interpretation of his act is that he intended to close the examination on that particular point. Had the counsel for the defendant then proposed a material question, not included in the questions and answers already made, the matter might have assumed, on an appeal, another aspect. As the case is presented there was no plain abuse of discretion; and without that the court will not interfere. Said PARKE, in *Middleton* agt. *Barned* (4 *Exch.*, 243): "We never interfere in such a

---

White agt. McLean.

---

case unless it be perfectly clear that a learned judge has wrongly exercised his discretion" (*Turnpike Co. agt. Loomis*, 32 *N. Y.*, 127).

It makes no difference that the witness under examination was the opposite party to the action. He is but a witness, and the general rules applicable to adverse witnesses govern the case. Though a broader range of cross-examination than is usual is allowable, it is still subject to the discretion of the court (*Clarke agt. Saffery, Ryan & Moody*, 126; *Ray agt. Missouri*, 17 *Wallace, U. S.*, 532).

These views are strengthened by the fact that this was a case of recross-examination, which might properly have been confined to the matters elicited on the redirect-examination.

II. The defendant's next objection is that the judge erred in his charge concerning the credit to be given to Sheridan as a witness by reason of his impeachment. After stating that six respectable and intelligent witnesses had sworn that Sheridan's character was bad and that they would not believe him on his oath, he added: "Now, I ought to state to you in this connection a *rule of law*, and that is, that when you retire to consider this case, if you shall find that Mr. Sheridan is impeached, then you can give no consideration to his deposition, it is to go out of the case as that of a man not to be believed on his oath; because every man who comes into a court of justice has the right to have his issues and his rights determined by credible evidence. I do not make these remarks as designing that you should draw any inference of my own upon the question whether he is impeached or not, for that belongs to you." He then called the attention of the jury to the fact that no witness had been produced indorsing Sheridan's character.

In another part of the charge the judge added, "I would say to you that if in any part of Mr. Sheridan's testimony you find him confirmed and supported by other evidence in the case, then you shall consider his evidence in its connection."

---

White agt. McLean.

---

The defendant's counsel excepted generally to that part of the charge relating to the impeachment of Sheridan's testimony.

The meaning of the charge, taken as a whole, plainly is that if the jury shall find, as a result of the testimony, that Sheridan's character is such that he is unworthy of belief, his testimony is to be disregarded. The word "impeach" is capable of two significations: one is the charge or accusation of want of veracity, the other is the establishment of the charge. The last sense is shown in the common phrases, "attempt to impeach" or a "failure to impeach," which imply that, though the charge has been made it has not reached a result. When the judge says to the jury, if you *find* that Sheridan is impeached, &c., he means if the jury reach the conclusion that his testimony is unworthy of belief, it is to be disposed of by them in the manner which he points out. The point of the charge open to plausible objection is that where he appears to affirm in substance that it is a rule of law that the testimony of a witness successfully impeached cannot be considered by the jury, "that it must go out of the case." If he had meant by this that the jury had no right to take it into account, his remarks would seem to be erroneous, for it is difficult to affirm that testimony legitimately before a jury, on a disputed question of fact, cannot be taken into consideration. In *Dunn agt. People* (29 N. Y., 523), a witness had sworn differently upon the same point at a former trial. The court held that the witness must not be pronounced by the judge wholly incompetent, nor his testimony be stricken out and wholly excluded from consideration. On the other hand it was said that the testimony must remain in the case and be considered by the jury in connection with the other evidence in the cause under such prudential instructions as might be given by the court. The case of *Dunlop agt. Patterson* (5 Cow., 243), so far as it holds a different doctrine, was overruled.

In *Lee agt. Chadsby* (2 Keyes, 543; S. C., 3 Keyes, 225),



---

White agt. McLean.

---

the court held that it was not error to charge the jury that the evidence of an impeached witness need not necessarily be wholly disregarded, but the jury may give it the weight to which, under all the circumstances of the case, it seems to be properly entitled.

It was not the intention of the judge in the present case to disregard the authorities, for, in another part of his charge he says: "If you find Sheridan confirmed and supported by other evidence in the case, then you shall consider his evidence in its connection." This could not be done if the testimony was to go out of the case "in the sense of being excluded from consideration. The judge appears to have had in his mind the rule in *Dunn* agt. *The People* (*supra*), though he did not express it with fullness and precision. He meant that the testimony was to be taken in connection with the other evidence in the cause. It is one of those unguarded expressions, in which counsel should have called the attention of the judge specifically to the phraseology used, and to have given him the opportunity to correct himself, or, if he persisted in an inaccurate statement, he should have specifically excepted to the objectionable words. As he did not choose to take this course, but preferred to rely on a general exception to the whole subject of impeachment as stated in the charge, and, as some portions of it are plainly correct, his objection cannot be entertained.

The judgment and order denying a new trial should be affirmed.

All concur.

---

Hale agt. Omaha National Bank.

---

## NEW YORK SUPERIOR COURT.

SETH W. HALE agt. THE OMAHA NATIONAL BANK.

*Lease of hotel property — lien on furniture — alleged conversion.*

Where a lease of hotel property contained an agreement, on the part of the lessees, that a lien should be given by them to the lessor on all furniture which should be placed in the hotel, contemplating the execution of a further instrument to create a lien, such covenant can be enforced in equity, and the lessees be obliged to give the security provided for, to secure the payment of the rent.

Where the assignee of the landlord, plaintiff, without having taken any steps to create the lien provided for in the lease, upon the property which had been placed in the hotel after the tenants had taken possession, subsequently took from them a chattel mortgage, covering the property in the hotel, to secure the sum of \$5,000, moneys loaned by him to them; and, after the defendant had, in an action, recovered possession of said property under a second chattel mortgage, given by the lessees to it, the plaintiff assigned his mortgage to defendant for a full consideration paid to him, and the defendant thereupon sold the property upon both mortgages, realizing barely sufficient to satisfy both mortgages:

*Held*, that the evidence produced was insufficient to satisfy the court that, before the defendant took its mortgage, it had any knowledge of the provisions in the lease in plaintiff's favor, in respect of the lien to be given by the lessees to the landlord; and no such notice was given by the plaintiff on a sale of the property.

In this action, brought by the plaintiff for a conversion of the property by the defendant, by means of which the plaintiff, as is alleged, is unable to enforce his lien, *held*, that the complaint be dismissed, with costs.

*Special Term, April, 1874.*

*Edward T. Bartlett*, for plaintiff.

*Wheeler H. Peckham*, for defendant.

---

Hale agt. Omaha National Bank.

---

VAN VORST, *J.*—The lease executed by Cozzens and Betman, as tenants, does not create an actual lien at law upon their personal property, but it contains an agreement, on their part, that a lien should be given by the lessees to the lessors, on all furniture which should be placed in the hotel. The agreement contemplated the execution of a further instrument to create a lien.

Such covenant could be enforced in equity, and the lessees be obliged to give the security provided for, to secure the payment of the rent (*Hale agt. Bank of Omaha*, 49 *N. Y.*, 626).

The plaintiff, on the 22d July, 1867, became the owner of the lease, by assignment, executed to him by the original landlord.

Without having taken any steps to create the lien provided for in the lease upon the property, which had been placed in the hotel, after the tenants had taken possession, the plaintiff, on the 14th day of October, 1867, took from the lessees a chattel mortgage, covering the property in the hotel, to secure the payment of the sum of \$5,000 and upward, moneys loaned by him to them.

On the 10th March, 1868, the lessees executed to the defendant a second mortgage on the furniture and chattels in the hotel, to secure the payment of the sum of \$5,900, theretofore loaned by the defendant to the lessees, and then due and owing, but the payment of which was extended sixty days, when the mortgage was given.

On the 28th April, 1868, the defendant, under and by virtue of its mortgage, took possession of the chattels in an action commenced by it against the lessees to recover such possession. In the action, it was adjudged that the defendant, as mortgagee, was entitled to such possession.

The defendant removed the property covered by its mortgage from the hotel, and while the same was in its possession under its mortgage, and on the 24th day of September, 1868, the plaintiff assigned to the defendant, in consideration of the



---

Hale agt. Omaha National Bank.

---

sum of \$5,600 paid therefor, the mortgage which had been executed to him on the 14th day of October, 1867. The defendant retained possession of the property, under both mortgages, until the 20th November, 1868, when they sold the same at public auction. The sale was made under both mortgages; notice of the time and place of sale being published for thirty days in the Omaha newspapers.

The evidence fails to satisfy me that, before the defendant took its mortgage, on the 10th March, 1868, it had any knowledge of the provisions in the lease in plaintiff's favor, in respect of the lien to be given by the lessees to the landlord.

Betman, one of the lessees, testifies that he gave notice of the lien to the cashier of the defendant, before the execution of the mortgage, but this statement is positively denied by the cashier, and both he and the president of the bank deny that they knew of such provision in the lease before taking the mortgage.

In May, 1868, at the time of the meeting of the creditors of the lessees in New York, a claim to a lien on the property, under the lease, was urged by the plaintiff, but its validity was denied by the president of the defendant.

This action is brought for a conversion of the property by the defendant, by means of which the plaintiff, as is alleged, is unable to enforce his lien.

In the first cause of action alleged in the complaint, the plaintiff claims that the defendant wrongfully converted the property and its avails, and in the second cause of action he alleges that the defendant wrongfully and unlawfully took possession of and sold the property, and disposed of the same to its use. It cannot be successfully claimed that the defendant's action in removing the property under the mortgage in its favor was wrongful or unlawful.

In taking such steps, defendant acted under the authority and power conferred by the mortgagors, who were, at the time of the execution of the mortgage, the owners, and in possession of the property.

---

Hale agt. Omaha National Bank.

---

It is difficult to perceive with what propriety the plaintiff can now object to the exercise of such legal right by the defendant, since, after the removal of the property, and with knowledge thereof, he voluntarily and for a valuable consideration assigned to the defendant his mortgage, taken anterior to that executed to the defendant, and which mortgage also authorized and empowered the mortgagee to take possession of and sell the property at public auction. A person should not be allowed to say that the act of another is wrongful or unlawful against him when he had authorized it to be performed.

At the time of the assignment of the mortgage to the defendant, it does not appear that the plaintiff made any claim to a lien on the property. He had taken no steps to acquire a lien. The assignment of the mortgage does not import that the same was made subject to any claim of lien in plaintiff's favor.

The assignment was made, professedly, subject only to the proceedings then pending in bankruptcy against the mortgagors; such single exception would appear to exclude any other claim.

From the facts and circumstances it is evident that defendant purchased the first mortgage to protect its possession and right under the second. This must have been understood by both parties. The plaintiff was advised by the affirmative act of the defendant, in taking possession under its mortgage and holding same, of its intention to have the property applied to the payment of the mortgage. Of necessity, any sale under the second must have been subject to the plaintiff's rights under the first. Hence it was an act of prudence on the part of the defendant to acquire the plaintiff's mortgage, and it was advantageous to the plaintiff to dispose of his mortgage, for by its sale he received the full amount secured to be paid thereby. Besides, the mortgaged property was barely a security for the payment of the two mortgages. The amount realized on the sale was \$10,117.81, which was

---

Hale agt. Omaha National Bank.

---

insufficient to pay the amount secured by the mortgages, less the expenses of sale.

There is no dispute but that the property brought its full value. The action of the plaintiff in assigning his mortgage is inconsistent with any claim of lien upon the property; and is an acquiescence in the act of the defendant in taking possession of the property under the mortgage in its favor, and the assertion of its rights thereunder.

The power to sell was an incident to the ownership of the mortgages.

A chattel mortgage is a sale of the property to the mortgagee; there remaining, however, in the mortgagor an equity of redemption. To cut off this equity a sale of the property on notice was necessary.

This right of possession of the chattels and to sell same passed to the defendant by the assignment of the plaintiff's mortgage. The force of this conclusion is not at all weakened by the fact that the defendant, being in possession, could have sold the property under the second mortgage. The assignment of the plaintiff's mortgage enabled the defendant to do the same thing, and it was made while the defendant was publicly exercising his right of ownership under the second mortgage.

In addition, the plaintiff, if he still claimed an equitable lien, could have given notice of same at the sale, and have followed the property in the hands of purchasers at the sale, and have still had the same impressed with his lien, and that, it appears to me, was his remedy, if any.

The plaintiff's complaint should be dismissed, with costs.



---

Platt agt. Stewart.

---

## UNITED STATES CIRCUIT COURT.

JOHN H. PLATT, assignee in bankruptcy of S. LELAND & Co.,  
respondent, agt. ALEXANDER T. STEWART and divers others,  
execution creditors, appellants.

*Appeal in bankruptcy—orders and decrees, final and interlocutory, defined.*

No appeal can be taken, under the eighth section of the bankruptcy act of 1867, from a decree, unless it be final.

*Clarke agt. Iselin (9 Blatchford C. C. Reps., p. 177) approved of.*

It has been the object of the supreme court, at all times, although an accidental deviation may be found, to restrict the cases which have been brought to that court, either by appeal or by writ of error, to those in which the rights of the parties have been fully and finally determined by judgments or decrees in the courts below, whether they were cases in admiralty, in equity or at common law.

A decree is understood to be interlocutory, whenever an inquiry as to a matter of law or of fact is directed, preparatory to a final decision.

A decree is final when it decides and disposes of the whole merits of the cause and reserves no further questions or directions for the future judgment of the court, or in which it will not be necessary to bring the cause before the court again for its final decision.

A decree may be final, although directing a reference, if all the directions depending upon the result of the master's report are contained in the decree, so that no further decree of the court will be necessary, upon the confirmation of the report, to give the parties the full benefit of the previous decision of the court.

Where a decree, setting aside certain conveyances as preferential and void under the bankruptcy act, also provides for an accounting of rents and profits before a master appointed for that purpose, and also provides for the master to ascertain and report on what would be a suitable and proper compensation to be paid certain sheriffs for their levies under execution in their hands, and services in and thereabout, to be paid out of the funds disposed of by the decree, it is not a final decree.

The two references provided for are important in their character, involving the examination of disputed facts and the settlement of complicated

---

Platt agt. Stewart.

---

questions of law. What shall be held to be the rule of recovery for the rents and profits in such case may, and ordinarily does, depend upon a great variety of facts, and involves results essentially different in different cases.

Although the decree as to the execution creditors, setting aside their judgments and executions, may, in the one sense, be final, yet, where their alleged rights in the matter affected a fund, to which the party whose appeal was dismissed laid claim, such party had a right to be heard on the appeal, and the decree not being final until his rights were disposed of, the appeals of the others must be dismissed, as the cause cannot be taken up in fragments.

*Southern District of New York.*

*Before Hon. WARD HUNT, U. S. Supreme Court Justice, holding Circuit, May Term, 1874.*

THE United States district court (BLATCHFORD, D. J.), in an action brought by John H. Platt, assignee of Simeon Leland & Co., lessees of the Metropolitan hotel, to set aside certain conveyances of real estate by the bankrupts to Alexander T. Stewart, as preferential and void under the bankruptcy act of 1867, and also to set aside the levies made by divers execution creditors on the furniture of that hotel, and also to set aside certain chattel mortgages given by the bankrupts to Mr. Stewart, made a decree setting aside the said conveyances of the real estate (four houses and lots in New York city and a farm in Westchester county), and also holding the chattel mortgages to be invalid as liens on the said furniture or its proceeds (the same having been sold by order of court and paid into court), and also setting aside the levies of the said execution creditors.

The decree further provided that Mr. Stewart should account to the assignee for the rents, issues and profits of the real estate so conveyed to him, and specified in what mode it should be done, before a special master; and further provided that Mr. Stewart, within twenty days after the entry of a final decree in the cause, should execute and deliver a proper deed, the form of which should be approved by a special mas-

---

Platt agt. Stewart.

---

ter appointed in the decree, to the assignee in bankruptcy, conveying and assuring to him the premises in controversy.

It further provided that the proceeds of the furniture in court belonged to and should be paid over to the assignee in bankruptcy, but thereout should be paid a reasonable compensation to certain sheriffs who had levied on the furniture under certain executions which by the decree were set aside.

From this decree Mr. Stewart appealed to the circuit court before the accounting was had, claiming that the decree was final. Two of the execution creditors also took appeals.

Motion was now made on the part of the assignee to set aside said appeals and to dismiss them as premature; the decree not being final. The motion as to Mr. Stewart's appeal was heard first.

*Dennis McMahon*, for the assignee.

I. The decree appealed from is one rendered in an equity suit, brought by the assignee in bankruptcy of Simeon Leland & Co.; it is therefore regulated by section 8 of the bankruptcy act.

II. In the following cases it has been held that such appeal cannot be taken except from a final decree: *Clark agt. Iselin* (9 *Blatchf. C. C. Rep.*, 199); *In Re Casey* (10 *id.*, 376).

III. So far as the defendant, Stewart, is concerned, the decree in question appealed from is not a final decree. It provides for an accounting of rents, issues and profits, which has not yet been had (*Craighead agt. Wilson*, 18 *How.*, 199; *Perkins agt. Tourinquet*, 6 *id.*, 206).

IV. A decree determining the rights of the parties, and referring it to a master to take an account of the rents and profits, &c., upon evidence, and from an examination of the parties to make or not to make allowances affecting the rights of the parties, and to report his results to the court, is not a final decree. In chancery a decree is interlocutory whenever an inquiry as to matter of law or fact is directed preparatory to a final decision (1 *New*, 322).



---

Platt agt. Stewart.

---

Although it is true that when a decree finally decides and disposes of the whole merits of the cause, and reserves no further question or direction for the future judgment of the court, so that it will not be necessary to bring the cause again before the court for its final decision, it is a final decree (7 *Paige*, 18; *Beebe agt. Russell*, 19 *How. U. S. S. C. R.*, 283).

V. The decree as to the four houses and farm is confessedly not a final decree, because it directs an accounting to be had by A. T. Stewart of the rents and profits received by him; such accounting is to be had on principles of charges and discharges set forth in the decree.

VI. The decree as to the \$25,000 in the custody of the court, on which A. T. Stewart claimed a special lien by virtue of his chattel mortgages, which last were declared to be invalid, is also not final, because there is a reference ordered to ascertain the liens of the sheriff thereon by virtue of levies made by him under certain executions on the personal property afterward sold and turned into the funds now in court.

This lien is declared to be valid on the fund in court in favor of the sheriff, and has to be ascertained before Mr. Stewart can overturn the decree on appeal.

It is therefore evident that, so far as Stewart is concerned, the decree is not final.

VII. So far as the execution creditors are concerned, in one sense the decree is final, for it disposes of their rights absolutely; but, so far as the sheriff's fees are concerned, and the ascertaining them is concerned, it is not final.

The case of *Forgay agt. Conrad* (6 *How.*, 201) is limited and explained in *Craighead agt. Wilson* (18 *How.*, 199), but reaffirmed in 7 *Wallace*, 342.

VIII. If the decision is not final as to Stewart, one or more of the other defendants cannot appeal. All parties must join in it (7 *Peters*, 399).

A case must not come up in fragments (3 *Peters*, 307; 3 *Dall.*, 188).

IX. This appeal being from the district to the circuit

---

Platt agt. Stewart.

---

court, it can hardly be said to bear the same relation that appeals from the circuit court to the supreme court bear.

In the latter case, on affirmance or reversal, the supreme court invariably sends its mandate down to the circuit to execute its decree or decisions. But in the former set of appeals the case is always retained in the circuit, and there seems to be no warrant for the latter to order the accounting to be taken anew.

That can only be done in the district court; and the decree must be in all respects final when it goes up from the district to the circuit, who simply affirm, or reverse, or modify. After the accounting is had in the district court for whatever damages the appellee sustains, by loss of interest or otherwise, the only recourse is to be had to the bond given on the appeal.

Therefore, the decree cannot be final in the district court until all its behests have been carried out.

*Henry E. Davies*, for A. T. Stewart, relied on *Forgay* agt. *Conrad* (6 *Howard U. S. S. C. R.*, 201, and 7 *Wallace*, 342).

*A. H. Dana*, for Muller & Conger, execution creditors, relied on the fact that the decree was final as to his clients, and claimed that this appeal was good.

*E. M. Cullen*, for Galway & Son, other execution creditors, made the same points.

After advisement, the following opinion was delivered.

*Hon. WARD HUNT, Justice.*—The assignee moves to dismiss the appeal in this case, on the ground that it is prematurely brought.

It is insisted, 1. That there can be no appeal under the eighth section of the bankrupt act, unless the decree from

---

Platt agt. Stewart.

---

which the appeal is taken is a final decree. This was held to be the law in *Clark agt. Iselin* (9 *Blatch.*, 177), and I cannot doubt that the holding was correct. A case that may be appealed from the district to the circuit court may be appealed from the circuit to the supreme court of the United States.

A system which will permit a case thus to be carried up in a fragmentary condition, and to be separately appealed in parts, and from time to time, would be found to be impracticable. The courts would be entirely clogged and litigation would never come to an end.

In *Beebe agt. Russell* (19 *How.*, 284) the supreme court of the United States say: "It has been the object of this court, at all times, although an accidental deviation may be found, to restrict the cases which have been brought to this court, either by appeal or by writ of error, to those in which the rights of the parties have been fully and finally determined by judgments or decrees in the courts below, whether they were cases in admiralty, in equity or at common law." Various cases are cited in support of the position taken.

It is insisted, secondly, that the decree in this case is interlocutory merely, and not final. In the case already cited from 19 *Howard*, the court say: "A decree is understood to be interlocutory, whenever an inquiry as to a matter of law or fact is directed, preparatory to a final decision (*Opinion*, 322). \* \* \* The most usual ground for not making a perfect decree, in the first instance, is the necessity which frequently exists for a reference to a master of the court, to make inquiries, or take accounts, or sell estates, and adjust other matters which are necessary to be disposed of before a complete decision can be come to upon the subject-matter of the suit; when a decree finally decides and disposes of the whole merits of the case, and reserves no further questions or directions for the future judgment of the court, or that it will not be necessary to bring the cause before the court again for its final decision, it is a final decree." It is added, that a



---

Platt agt. Stewart.

---

decree may be final, although directing a reference, if all the directions depending upon the result of the master's report are contained in the decree, so that no further decree of the court will be necessary, upon the confirmation of the report, to give the parties the full benefit of the previous decision of the court (*Mills* agt. *Hoag*, 7 *Paige*, 18).

In the decree before us, it is adjudged that the conveyance by the bankrupts to Mr. Stewart was void, and that reconveyance should be made of the same to the assignee, and also that Mr. Stewart should account for and pay over to the plaintiff the rents and profits thereof, deducting lawful and proper credits and allowances from the time he acquired title to, and took possession of, the same.

It is further adjudged that the chattel mortgages given to Mr. Stewart are void, and that the proceeds of the same, now in court, belong to the assignee. Certain judgments set forth are declared not to be valid liens upon said fund, and certain judgments set forth are declared to be valid liens on the real estate described.

It is further ordered that the three sheriff's officers named are entitled to compensation for their services in levying upon said property; and for the purpose of ascertaining said compensation a reference is ordered to a master, to inquire into and hear the evidence of the different parties in interest as to said matter, and to report with his opinion what would be a proper sum to be allowed therefor, and that such further decree may be made on those questions as shall seem proper on the coming in of such report.

A reference was ordered to the same master to take and state an account of the rents and profits of the houses and lots mentioned; in such hearing to require the attendance of witnesses and parties, and that he report to the court with all convenient speed.

The two references provided for are important in their character, involving the examination of disputed facts and the settlement of complicated questions of law; what shall

---

Platt agt. Stewart.

---

be held to be the rule of recovery for the rents and profits in such case may, and ordinarily does, depend upon a great variety of facts, and involves results essentially different in different cases.

It may be that the limit of recovery will be that of actual receipts; it may be of what the holder ought to have received. The question of allowance for betterments or improvements sometimes involves the nicest questions of law.

These remarks are applicable also to the question of compensation to the sheriffs. All these questions, upon the coming in of the master's report, must be submitted to and be passed upon by the court. In no just sense, therefore, can the decree in these respects be deemed a final one.

It is obvious, upon the face of the decree, that it was not intended as a final decree; thus, although the conveyance to Mr. Stewart is adjudged to be void, it is not ordered that he deliver, at once and unqualifiedly, the deeds of reconveyance to the assignee; on the contrary, such reconveyance is not to be made until twenty days after service of a certified "copy of a decree hereafter to be entered, after such accounting as the final decree in the cause." The same language is repeated in another part of the decree.

In this respect the present decree differs from that in *For-gay* agt. *Conrad* (6 *How. R.*), where the decree decides the whole matter in controversy and directs the immediate delivery of the property to the party entitled.

That that case does not control the present 'is apparent from the subsequent case of *Beebe* agt. *Russell* (19 *How.*, 283), where it was held that a decree referring it to a master to take an account of rents and profits upon evidence and from an examination of the parties, and to make allowances affecting the rights of the parties, and to report the results to the court, was not a final decree.

A dismissal of this appeal involves only a delay until the completion of the proceedings referred to.

The motion to dismiss the Stewart appeal is granted.

---

Platt agt. Stewart.

---

The various counsel then were heard on the motion to dismiss the appeals of the execution creditors. The court took time to consider, and delivered the following opinion :

*Hon. WARD HUNT, Justice.*—The appeal of Mr. Stewart having been dismissed, he is no party to this record in the circuit court; yet this court are called upon by the execution creditors, on their appeals, to dispose of the fund in court, the proceeds of the furniture of the Metropolitan hotel, on which Mr. Stewart claims he has a valid chattel mortgage, which, it is true, the court below have decided to be invalid, but from which decision Mr. Stewart desires and intends again to appeal when the decree is sufficiently final in the court below for him to do so.

It is evident, therefore, that to hear these execution creditors on their appeal now, might be the means of depriving Mr. Stewart of his rights to that fund, without his having an opportunity to be heard on appeal, although strenuously endeavoring to do so. Mere notice to him of the argument of the appeal in this court is not enough; he is entitled to be a party to the appeal on the record.

Then, again, a cause cannot be taken up in an appellate court in this fragmentary way. It must be final as to all.

Then, again, the assignee who claims the whole of this fund in the court below is entitled to have but one controversy between all the parties claiming interests therein. It would be an anomaly for one portion of the claims to be litigated in this court and another in the court below, yet the different claimants not bound by each other's proceedings, unless parties to the record. The assignee is entitled to implead and have a decision as to all in the one tribunal, before it can be reviewed in an appellate court.

The decree appealed from must be final to all parties, and as to all rights claimed in the litigation sought to be argued anew on appeal.



---

Driggs agt. Smith.

---

## N. Y. COMMON PLEAS.

SETH DRIGGS agt. SILAS C. SMITH.

*Contempt in supplementary proceedings.*

The second subdivision of section 292 of the Code only authorizes the proceeding to compel an appropriation of such of the debtor's property, to the satisfaction of the judgment, as he unjustly refuses to apply thereto, when the judgment debtor *resides in the same county with the officer*.

Where the affidavit upon which the order for examination is obtained under this subdivision does not show that the debtor resides in the same county with the officer, but resides out of the state, having a place of business here, the officer does not get any jurisdiction in the proceedings, notwithstanding the defendant's appearance without objection—much less does the officer have power to punish as for a contempt.

MOTION to punish defendant for contempt in supplementary proceedings.

*T. C. Campbell*, for plaintiff.

*C. T. Cromwell*, for defendant.

ROBINSON, *J.*—In *Bingham* agt. *Disbrow*, the court of appeals held that, as the power given by section 292 of the Code was merely statutory, “unless the facts necessary to bring the case within the section are proved, the judge has no jurisdiction, and the mere appearance of the judgment debtor, and his examination without objection, do not confer jurisdiction.”

This is a proceeding under the second subdivision of section 292 of the Code, instituted with a view of compelling the

---

Driggs agt. Smith.

---

judgment debtor to apply property to the satisfaction of the execution thereon, in the hands of the sheriff. The affidavit on which such order was obtained did not show, as required, that the judgment debtor resided in this county, but, on the contrary, stated that he resided at Wallingford, in the state of Connecticut, and, at most, under various allegations, stated he had a place of business in this city. Upon it the usual order for an examination of the defendant was procured, accompanied with an injunction against his transferring or making any other disposition of his property (not exempt from levy by execution), or in any manner to interfere therewith. While the first subdivision allows the proceeding supplementary to execution, after it has been returned unsatisfied against a defendant who resides or has a place of business in the county to which it has been issued, and against a defendant residing out of the state, when such execution has been issued to the county where the judgment roll or a transcript of a justice's judgment of twenty-five dollars, exclusive of costs, has been filed, this second subdivision only authorizes the proceeding to compel an appropriation of such of the debtor's property to the satisfaction of the judgment, as he unjustly refuses to apply thereto, when the judgment debtor resides in the same county with the officer. Under the authoritative opinion of the court of appeals, in *Bingham* agt. *Disbrow* (*supra*), the affidavit on which this proceeding was instituted conferred no jurisdiction on the officer granting the order, notwithstanding the defendant's appearance without objection, and far more is the defendant justified in making the objection when it is attempted to punish him for contempt.

The proceeding is purely statutory, and not in the course of the common law, or one extending the remedial power of the court to enforce its own judgment, but it is intrusted for its execution to the judges named, upon preliminary proof of a special character. Without such proof of the material facts required to be stated, no jurisdiction exists, and the orders

---

Driggs agt. Smith.

---

granted are not alone irregular but void as against the party proceeded against. That which is void is not amendable, and the question of jurisdiction may be raised at any stage of the proceeding (*Grocers' Bank* agt. *Clark*, 31 *How.*, 123, and cases cited; *Kerr* agt. *Mont*, 28 *N. Y.*, 659).

Without regarding the answer made to the application that the money, for interference with which defendant is sought to be punished for contempt, did not belong to him, but to the principal for whom he was acting, I am of opinion the proceedings should be dismissed, with ten dollars costs.



---

Mitchell agt. Vermont Copper Mining Company.

---

## N. Y. SUPERIOR COURT.

ANN ELIZA MITCHELL, Executrix, &c., of SAMUEL L. MITCHELL, deceased, agt. THE VERMONT COPPER MINING COMPANY, SMITH ELY and JOSEPH J. BICKWELL.

*Sale of stock—regularity of proceedings—invalid sale.*

All the material steps of a proceeding to sell out a shareholder of a stock company for non-payment of an assessment, when questioned, should be clearly and satisfactorily proven; especially so important a one as the giving of notice of the time and place of sale to the person to be affected, and whose rights are to be cut off.

Where checks of the parties from whom assessments were due were requested by the treasurer of the company, the tender in that form must be held sufficient, especially so, where no objection was made at the time of the tender to payment by check.

Where tender by check was made by a shareholder, for the amount of his assessment, to the president of the company on the morning of the day of sale, and before the sale, with directions not to have his stock sold for the assessment, *held*, that this was sufficient to prevent the sale.

And where the sale of the stock was made, notwithstanding such tender and directions, and was bid in by the president, individually, who claimed to purchase it for himself, *held*, that the sale was invalid; that the president, the purchaser, acquired no title to himself, and the sale should be set aside.

*Special Term, June, 1874.*

VAN VORST, J.—Samuel J. Mitchell, the testator and owner of the stock, testified on the trial that he had not received notice by mail or otherwise from the officers of the proposed sale of his stock. But he saw a notice of the sale, advertised in one or more of the city papers. There is no positive evidence of the mailing to him of a copy of the notice of sale. The testimony of the treasurer is that he mailed notices to all the stockholders in default, as their names and residences appeared on the books. He had no distinct recollection, how-

---

Mitchell agt. Vermont Copper Mining Company.

---

ever, of mailing a notice to Mitchell, other than that he mailed notices to all the stockholders in default. It is questionable whether that is sufficient to establish the giving of a distinct notice to Mitchell by mail of ten days before the sale, as provided for in the by-laws. There should have been, under the denial of Mitchell that he received such notice, positive proof of the mailing of a notice to him individually. All the material steps of a proceeding to sell out a shareholder for non-payment of an assessment, when questioned, should be clearly and satisfactorily proven; especially so important a one as the giving of notice of the time and place of sale to the person to be affected and whose rights are to be cut off. Some record should have been made and kept of the service of such notices, which would enable the party serving to prove the same beyond question. It should not be left to unaided recollection, or to be proved by a general statement of service upon all, from which it might be inferred that each was included.

But the decision of this case does not rest upon a failure of proof in this regard. Mitchell having seen a notice of the sale, before it took place, in the public papers, came into the city on the morning of the day. He was quite unwell. He went to his office, and told his clerk, Davis, that he did not want his stock sold; that he must attend the sale and prevent its being sold. The book-keeper and confidential clerk of Mitchell testified that he made out a check for the amount of the assessment, payable to the order of Smith Ely, the president of the company, and that the same was handed by either Mitchell or himself to another clerk, William C. Davis. Mitchell himself does not remember the circumstances in regard either to the making or delivery of the check. But the directions he gave to his clerk to have the sale attended, and the sale of his stock prevented, would include the payment of the assessments due. W. C. Davis testified positively that he received the check and took the same to the office of the corporation before the hour of sale, and there tendered

---

Mitchell agt. Vermont Copper Mining Company.

---

the same to Ely, the president, who declined to receive it, urging as a reason that the stock could not then be withdrawn, but at the same time stating that he would buy in the stock and protect it. Davis protested against the sale. Ely testified that no tender of a check was made to him; but that, on the other hand, a note was delivered to him from Mitchell, in which he expressed a readiness to pay if the president would give him some assurance of the correctness of the treasurer's accounts, which he declined to do.

That such note was delivered to Ely on the morning of the day of sale is established.

In regard to the check, I am of opinion that the preponderance of evidence is that a tender thereof was made and declined. Ely must have forgotten the circumstances in regard to it.

The check itself for \$2,188.20, dated on the day of the sale, is produced, bearing the proper number in the consecutive order of checks in Mitchell's check-book, payable to the order of Ely, president, and the testimony of the person who drew it on the day of its date, and of its delivery to W. C. Davis for the purpose of being tendered to prevent the sale, supplemented by the positive statement of Davis that he actually made the tender, must be held to establish the fact of tender.

As, under the evidence, checks of the parties from whom assessments were due were requested by the treasurer, the tender in that form must be held sufficient, especially so as no objection was made at the time to payment by check. The refusal of the president to receive the check was placed on another ground.

Whether the check was tendered and refused before or subsequent to the delivery of the note on the morning of the day of sale, its effect would have been the same and should have prevented the sale. To have that effect, however, the tender should have been unqualified. There is no evidence of any qualification at the time of the tender of the check, nor is it claimed to have been made at the time the note was



---

Mitchell agt. Vermont Copper Mining Company.

---

delivered. Ely himself testified that no check was handed to him with the note.

I do not think the refusal of the check was made in bad faith, for the evidence shows that it was intended, by the president, formally to bid in the stock, and that, after the sale, Mitchell might still pay and relieve his stock from the consequences of the sale, and word was sent to him to that effect.

The stock was sold, and was purchased by Mr. Ely, who was, at the time, a director of the company, and its president, at \$1.25½ per share.

The sale was made by the directors, and was conducted under the direction of the treasurer; the president himself being present and making the bid for the stock, which was struck down to him individually, and he claims, in this action and on the trial, to have made the purchase for himself.

No auctioneer had been designated for the purpose of making the sale by the board of directors. The by-law passed 19th of December, 1859, provides that, "when the stock of any stockholder shall be ordered, by the directors, to be sold for unpaid assessments, such sale to be made in the city of New York, by such auctioneer as the board shall direct." On the sixteenth of August, 1865, at a meeting of the board of directors, a resolution was passed, "that the treasurer is hereby empowered to sell the stock upon which said assessment (the assessment in question) shall remain unpaid, at public auction, in accordance with the by-laws."

I apprehend that said resolution is not a designation of the treasurer as the auctioneer; nor does the testimony show that the treasurer acted as auctioneer. The meaning of the resolution of the sixteenth of August undoubtedly is, that the treasurer, the fiscal officer, shall conduct the sale; that the same shall be made under his direction, in pursuance of the by-laws, which contemplated the designation of an auctioneer by the board. A designation by the treasurer of an auctioneer

---

Mitchell agt. Vermont Copper Mining Company.

---

would not satisfy the terms of the by-laws. That required the judgment and decision of the directors themselves.

But there is a more fatal objection to allowing the sale to stand than any yet mentioned, growing out of the fact that the president of the corporation claims to be the purchaser of the stock for himself. The relation between the directors who ordered the sale, and who, in fact, made it, and the stockholder, Mitchell, was that of trustee and *cestui que trust*, and that, notwithstanding the fact that Mitchell was himself a director.

That a director, and especially one actually engaged in the proceeding anterior to and at the time of sale, should become a purchaser of the shares of a stockholder he is engaged in selling, for the non-payment of an assessment, is open to very grave objections, and is in violation of well-settled rules of equity.

Under such circumstances, one who sells should be withheld from any temptation to become a purchaser. Such sale may not be absolutely void; the *cestui que trust* may adopt or acquiesce in the sale; but he has the option to demand that the sale be vacated, or that the purchaser be compelled to account to him for the value of the shares.

I am aware that justice SUTHERLAND, at special term, in *Carpenter agt. Danforth* (52 Barb., 582), held that a sale of stock by a stockholder to a director is not so far connected with, or the subject of, a trust relation, as to subject the director to the principles of equity applicable to the dealings and contracts of parties between whom there is a trust or confidential relation, so as to call upon the director to disclose to the seller material facts on the question of the value of the stock. But that was a case of the voluntary sale of stock made by a shareholder to one of the trustees for an agreed price. The learned justice, in the course of his opinion, says: "The directors are not trustees for the sale of the stock of the corporation. They have no power, as directors, to sell stock. They have no power to sell any stock but their own. The

---

Mitchell agt. Vermont Copper Mining Company.

---

defendant, Danforth, was not a trustee for the sale of the plaintiff's stock. The plaintiff's stock was not a subject of trust between them, nor had the trust relation between them any connection with the plaintiff's stock."

But in the case we are considering, the directors were trustees for the sale of the stock. They had power, under the Vermont statutes, as directors, to sell and receive the proceeds of the sale; and were obliged, after deducting the amount of the assessment, to pay over to the stockholders in default the residue of the moneys arising on the sale (§ 12, *chap.* 86, of the compiled *Laws of Vermont of 1862*; *Butts agt. Wood*, 37 *N. Y.*, 317; *Gardner agt. Ogden*, 22 *N. Y.*, 332).

The evidence does not satisfy me that Mitchell ever approved of, adopted or acquiesced in the sale of his stock or its purchase by the president.

It appears that the president did not, on the day of the sale, pay, and has not subsequently paid for the stock; that he has not, in fact, completed his purchase. It does not appear that any memorandum of the sale was made or assigned by him. Some eighteen months after the sale he made a tender to the treasurer of the amount for which he bid in the stock, which was declined. It does not appear whether the sale was made for cash or on credit. The terms disclosed at the sale do not appear in evidence.

Davis testified that the president said to him on the day of sale that he would bid in the stock and protect it, and it could be arranged afterwards. Mitchell declined to recognize the sale as valid.

Mr. Ely has testified to two interviews between himself and Mitchell subsequent to the sale. On the first occasion nothing was said on the subject. The second interview occurred in the street, when Ely met Mitchell on the corner of Fortieth street and Madison avenue, on the 1st of January, 1868. Ely testified that he said to Mitchell: "'I understand that you are dissatisfied with our proceedings in regard to the sale of that



---

Mitchell agt. Vermont Copper Mining Company.

---

stock.' He said, 'Yes, you had no right to sell the stock, at least no more than enough to pay the assessment.' I said, 'Mr. Mitchell, I bought that stock; now, if you will pay your assessment, place us where we could have been if the sale had not taken place, this stock is yours.' Said I, 'Have you now anything to complain of?' He said to me, 'I know nothing about it,' turned on his heel and left me in the street." This evidence fails to show any recognition or adoption by Mitchell of any purchase of the stock in question by the president of the company to his own use. Ely subsequently offered the stock to the corporation at the rate at which it was struck down to him, and then made the tender of payment to the treasurer above mentioned.

On the 15th day of May, 1868, the directors resolved "that the stock of Samuel L. Mitchell, bought by Mr. Ely at a sale for assessment, September 17, 1866, having been by him repeatedly offered to the company, at the cost to him, we accept his proposition, and the stock to be held by him subject to our order."

On the 22d of August, 1868, the directors passed a resolution rescinding the resolution of the fifteenth of May, Mr. Ely voting for the resolution.

Under the circumstances of this case I am of opinion that the sale made on the 17th of September, 1868, of the stock of Mitchell was invalid; that the defendant, Ely, acquired no title to himself thereby, and that the same should be set aside.

---

Dupuy agt. Wurts.

---

## SUPREME COURT.

T. HARKINS DUPUY agt. CHAS. P. WURTS, Executor, and others.

*Extra allowance of costs.*

The statute makes the appeal from the decree of a surrogate's court to this court *res nova*, for the purposes of costs, and this court is clothed with full discretion in the matter.

By section 318 of the Code, the appellate court is *pro hac vice* made the court of original jurisdiction in granting an additional allowance of costs.

Where a cause originating in a surrogate's court, and the decree on appeal was affirmed by the general term of this court, and again, on appeal, was affirmed by the court of appeals, which court directed that the costs of all the parties in that court and in the courts below should be paid out of the estate, *held*, that the order of the special term granting an additional allowance should be affirmed.

*New York General Term, March, 1874.*

APPEAL from order of special term granting additional allowance of costs.

*Owen, Nash & Gray*, for appellants.

*Coudert Brothers*, for respondent.

DAVIS, P. J.—This case came into this court by appeal from the decree of the surrogate of the city and county of New York, admitting the will in contest to probate. The decree of the surrogate was affirmed by the general term, and, on appeal to the court of appeals, the judgment of the

---

Dupuy agt. Wurts.

---

supreme court was also affirmed. The question of costs was disposed of by the court of appeals, by directing that the costs of all the parties in that court and in the courts below should be paid out of the estate.

It appears that, on the decision of the case in his court, the surrogate allowed counsel fees to the respective parties, and among such allowances the sum of \$1,000 to the contestant's counsel.

The special term granted the motion for the additional allowance, and from the order entered thereupon this appeal is taken.

We are of opinion that the court below had power, under the Code, to grant an allowance. The 318th section of the Code is clear and explicit.

From the time the appeal from the surrogate was brought before the supreme court for review, the proceedings are to be deemed an action at issue on a question at law "for all purposes of costs." For such purposes the case is to be treated as an action originally commenced in this court, and tried upon an issue of law. *Sequine agt. Sequine* (3 *Abb. Pr. Rep.* [N. S.], 442) is precisely in point, and, we think, was correctly decided.

*Wolf agt. Van Nostrand* (2 *N. Y.*, 570), and *The People agt. The N. Y. Central R. R. Co.* (29 *N. Y.*, 428), hold that appellate courts cannot grant the allowance, because the statute gives the same by way of indemnity for the expense of the trial in the court of original jurisdiction. This court, in a late case, has followed those decisions and denied an allowance, when no costs were recovered by either party in the court in which the action was tried. But by section 318 of the Code, the appellate court is *pro hac vice* made the court of original jurisdiction.

The objection that an allowance having been made in the surrogate's court, none can be made in this, is not well taken. That allowance was exclusively for services in that court; and as the statute makes the appeal to this court *res nova*



---

Dupuy agt. Wurts.

---

for the purposes of costs, the court is clothed with full discretion in the matter.

There is no reason to interfere with the order on the ground that the amount was excessive.

The order should be affirmed, with costs.

LAWRENCE and DANIELS, JJ., concurred.

---

Morley agt. Stevens.

---

SUPREME COURT.

FRANK A. MORLEY agt. CHARLES H. STEVENS and WILSON GARRISON.

*Joint judgment debtors—liability.*

Where a joint judgment against two defendants is assigned to a copartnership firm, of which one of the members is one of the judgment debtors, it satisfies the judgment as against the other judgment debtor.

*Onondaga Special Term, March 31, 1874.*

MOTION by the defendant, Wilson Garrison, for a perpetual stay of proceedings supplementary to execution on the judgment in this action, and for a perpetual stay of all proceedings against said Garrison, to collect said judgment and for an order declaring the judgment satisfied.

The facts are sufficiently stated in the opinion.

*Irving G. Vann*, for defendant Garrison.

*Andrew H. Green*, for assignee Beard.

MORGAN, J.—The affidavits show that the defendants, Stevens & Garrison, were partners, and as such contracted the debt on which this judgment was obtained; that prior to the judgment they dissolved partnership, and under the articles of dissolution the defendant, Stevens, assumed the payment of this debt. Afterwards, Stevens formed a new copartnership with Huntington, Beard and Charles S. Hickson; that Beard purchased the judgment for fifty cents on a dollar and took an assignment to the firm of which Stevens

---

Morley agt. Stevens.

---

was a member, and at the same time procured a satisfaction-piece from the plaintiff, with a view, as he testifies, of setting off the judgment against the claim of the defendant, Garrison, against his firm, and actually tendered the satisfaction-piece to Garrison as a set-off against the claims of Garrison, which Garrison refused to accept as such set-off; that thereupon the firm of which Stevens was a member assigned the judgment to Beard, one of the members. An execution having been previously returned *nulla bona*, Mr. Beard obtained an order for the examination of Garrison, which was still pending when this motion was made.

In my opinion, the assignment of the judgment to the firm of which Stevens was a member operated at law as a satisfaction of the judgment. He was the one whose duty it was to pay the judgment, and when he became the purchaser the judgment was satisfied, both at law and in equity. If two persons make a note and one of them afterwards becomes possessed of it as his own property, the note is discharged (*Cox agt. Hodge*, 7 *Blackf.*, 146). So marriage of one of the obligors with one of the obligees, extinguishes the debt (4 *Mon. [Ky. court of appeals]*, 452; *Suttle agt. Whitlock*).

This is doubtless the rule at law; yet, when justice requires it, the debt will be kept alive in equity for the benefit of a surety who has paid the demand (*Cottrell's Appeal*, 23 *Penn.*, 294).

When separate judgments are recovered against maker and indorser, the latter may pay the judgment against himself and take an assignment of that against the maker, and enforce it by execution or otherwise (*Clayton agt. Morris*, 10 *John. R.*, 525). But in case of a joint judgment against two, though one is surety for the other, payment by one will discharge the judgment as against both (*Ontario Bank agt. Meker*, 1 *Hill*, 652; *Bank of Salina agt. Abbott and others*, 3 *Denio*, 181).

These cases have been criticised but are not overthrown,



---

Morley agt. Stevens.

---

so far as they decide that one of the joint debtors in a judgment cannot pay the judgment and take an assignment to himself, even of a surety. The cases are considered overruled so far as they apply the rule to the indorsers of a negotiable promissory note who are sued with the maker and a joint judgment obtained against both. It is held that the statute, allowing them to be sued in one action, saved the rights of the indorsers; and, as to the rule in question, the judgment is to be regarded as a several judgment against each (*Corry agt. White, 3 Barb., 12*). Doubtless if the assignment had been taken to Beard he could have enforced the judgment, but when he purchased on behalf of his firm and took an assignment to the firm of which Stevens was a member, whose debt then it was to pay, there are no grounds upon which the judgment can be kept alive as against the defendant, Garrison. A right once suspended cannot be renewed by an assignment from the party owing the debt to a third person. The subsequent assignment to Beard did not create any new rights as against the defendant, Garrison.

In my opinion the defendant, Garrison, is entitled to a perpetual stay of all proceedings on the judgment as against him, on the ground that the judgment as to him is to be regarded as satisfied by the purchase of it by his co-defendant, who was the principal debtor. No case can be found that relieves the purchaser from the operation of the rule, because the debtor is a member of a firm and the purchase is made in the name of the firm. It is enough that the debtor justly owing the debt is one of the purchasers. The firm may charge him with the payment of the purchase price, but can have no remedy at law as against another defendant in the same judgment.

Motion granted to stay all further proceedings on the judgment, on the ground that the judgment is satisfied as to the defendant, Garrison, with ten dollars costs of motion, to be paid by the assignee, Beard.

---

Gibson agt. Van Derzee.

---

Contra  
3 How 316

## SUPREME COURT.

DAVID GIBSON, SURVIVOR, &amp;C., agt. WILLIAM L. VAN DERZEE.

*Joint judgment debtor — to show cause — section 375, Code.*

Where a joint judgment debtor is summoned to show cause why he should not be bound by the judgment rendered on contract, he cannot set up as a defense to the original cause of action, the *statute of limitations*.

Section 99 of the Code provides that "an action (on contract) is commenced as to each defendant when the summons is served on him, *or on a co-defendant who is a joint contractor*." If the cause of action was not barred by the statute when it was originally commenced, the co-defendant summoned to answer cannot interpose it as a defense, because the action was commenced against both defendants at the same time by service on one.

*N. Y. Special Term, 1873.*

VAN BRUNT, J.—This proceeding is instituted under section 375 of the Code, the defendant being summoned to show cause why he should not be bound by a judgment entered February 13, 1866, against his joint debtor, one Hillyer. The defendant answers that the statute of limitations has run against the original cause of action, and to this answer the plaintiff demurs.

Section 379 of the Code says that, "upon such summons, any party summoned may answer within the time specified therein, *denying the judgment or setting up any defense thereto which may have arisen subsequently to said judgment*. It will be seen that the defendant may deny the judgment, or set up any defense *thereto*; that is, *to the judgment*, which may have arisen subsequent to such judgment. Such defenses would be payment, release, discharge in bankruptcy and the like, they all being defenses to the judgment.

---

Gibson agt. Van Derzee.

---

Now, what more can the party do? The section says, "*he may make any defense which he might have made to the action, if the summons had been served on him at the time when the same was originally commenced, and such defense had then been interposed to such action.*" That is, he has the same rights which he would have, if served with the summons, and can now set up as *a defense to the cause of action* any defense which he could have set up if served with the summons, and no other. Any other construction would be at variance with the section of the Code in reference to the times for commencing actions. Section 91 prescribes that all actions on contract must be commenced within six years; and section 99 provides that an action is commenced, as to each defendant, when the summons is served on him, *or on a co-defendant who is a joint contractor*. Thus it would appear that if no judgment had been entered, and Van Derzee had not been served with a summons until now, he could not set up the statute of limitations, because the action had been commenced within the six years by the service of his co-defendant, Hill-  
yer, with a summons; and could it have been the intention of the legislature to put a plaintiff in a worse position, because he has entered his judgment, than if he had not done so?

It seems to me that it was the evident intention to put the parties in precisely the same position that they would have occupied had the action been commenced as to one, and no judgment entered until the other had been served with process.

I am aware that judge LEONARD, in the decision of the case of *Berlin agt. Hall* (48 Barb., 442), has made use of language which gives a different construction to this section; but this question was not before the court, and possibly the learned judge, in giving his opinion, may have overlooked the considerations which seem to demand a different construction.

Demurrer must be sustained. Defendant to be allowed to amend his answer, upon payment of costs, in twenty days.



---

Handley agt. Quick.

---

## SUPREME COURT.

JOHN HANDLEY agt. PETER A. L. QUICK.

JOHN W. MAYNARD agt. PETER A. L. QUICK.

*Jurisdiction—order for publication of summons—property in the state.*

Where considerable evidence was shown, by affidavits, to obtain an order for service of the summons by publication, that the defendant could not, after due diligence, be found within the state; and positively averred by the plaintiffs, on personal knowledge, that the defendant was a non-resident and his actual place of residence abroad was given; also averred in terms that "the defendant cannot, after due diligence, be found within this state, he now being, as deponent is informed and believes, at or near Milford, in the state of Pennsylvania aforesaid," his place of residence; also that the plaintiff's attorney stated "that he had sent to the sheriff of Orange county (which adjoins the county of the defendant's residence in Pennsylvania) a copy of the summons and complaint in this action, to be served upon said defendant, if he could be found, \* \* \* and had received a telegram from the sheriff stating that he had been unable to serve said summons;" *held*, sufficient to give the officer jurisdiction to make the order.

*Held*, that this evidence makes a stronger case than was made in *Van Wyck* agt. *Hardy*, and sustained in the court of appeals (39 *How.*, 392); and quite as strong as that which was held sufficient by the general term in *Waffle* agt. *Gable* (53 *Barb.*, 517). (See also *Smith* agt. *Matson*, *ante*, page 118.)

Where the plaintiff's affidavits distinctly averred, on information and belief, the existence of the fact that the defendant *had property within this state*, and then related a circumstance of which they had been informed, and the source of their information, having a tendency to prove it, but did not state whether this was all the information they had on the subject; *held*, that this was barely sufficient to enable the officer to pass upon the question. It is doubtless true that this is a fact, the actual existence of which is essential to the jurisdiction of the court.

On a subsequent motion by the defendant (at the same special term), on new affidavits to set aside the orders of publication, on the ground that the defendant in fact had no property in the state when the orders were

---

Handley agt. Quick.

---

granted; *held*, after a careful examination of voluminous affidavits on both sides, that the court was decidedly impressed that the proceedings of the defendant from the outset, in regard to the property in question, had been taken in bad faith, merely to avoid the payment of his indebtedness to the plaintiffs. Motion denied with costs.

*Broome Special Term, January 13, 1874.*

MOTIONS to set aside orders granted by the county judge of Chemung county, directing the service of the summons in each action by publication, on the ground that the affidavits were insufficient to warrant the same. The affidavits were precisely alike in each case, so far as the questions involved in these motions are concerned. The plaintiff in each case deposed "that said defendant is not a resident of this state, but resides near the village of Milford, in the county of Pike and state of Pennsylvania; that the post-office address of said defendant is Milford, Pike county, Pennsylvania; that deponent has addressed letters to and received answers from said defendant, respectively addressed to and post-marked at said Milford; that said defendant cannot, after due diligence, be found within this state, he now being, as deponent is informed and believes, at or near Milford aforesaid, which deponent knows to be the place of residence of said defendant; that said defendant has, as deponent is informed and believes, property within this state, to wit, certain money deposited in certain banks in the village of Port Jervis, in the county of Orange; that, on the twenty-sixth day of June last, deponent procured from the county judge of Chemung county an order of attachment in this action against the said defendant, and has been shown by George M. Diven, deponent's attorney in this action, a letter from Charles H. Wygant, sheriff of Orange county, dated the twenty-seventh day of June last, stating that he had on that day attached \$13,000 in the First National Bank of Port Jervis and \$15,000 in the National Bank of Port Jervis, under the aforesaid attachment against said Peter A. L. Quick." The attorney, Mr. Diven, also deposed "that he had sent to said

---

Handley agt. Quick.

---

sheriff of Orange county a copy of the summons and complaint in this action, to be served upon said defendant if he could be found; that deponent has this day, in answer to a despatch sent by deponent, received a telegram from said sheriff stating that he has been unable to serve said summons; that Pike county, Pennsylvania, adjoins the county of Orange in this state." The motions are founded on two grounds: 1. That the affidavits do not show that the defendant could not, after due diligence, be found within this state. 2. That they do not show that the defendant has property within the state.

*David B. Hill*, for the motions.

*George M. Diven*, contra.

COUNTRYMAN, *J.*—After some hesitation, I have concluded to hold that the affidavits were sufficient to give the officer jurisdiction, and set forth facts enough to enable him to determine judicially whether a case existed for granting the orders of publication. It requires a very liberal indulgence to the officer in the exercise of his judgment to justify this conclusion. There ought to be a more literal compliance with the provisions of the Code in these proceedings. The affidavit should be required to state in detail the information, or the facts and circumstances, as the case may be, upon which he relies to sustain his inferences or his belief. But the general tendency of the recent decisions is to uphold the proceedings when taken in good faith, in the absence of any affirmative evidence disproving the facts alleged, if the original papers contained evidence calling for the exercise of the judgment of the officer who is required, in the first instance, to determine their sufficiency (*Van Wyck* agt. *Hardy*, 39 *How.*, 392; *Waffle* agt. *Gable*, 53 *Barb.*, 517; *Peck* agt. *Cook*, 41 *Barb.*, 549; *Miller* agt. *Adams*, 52 *N. Y.*, 409, 410; *Steinle* agt. *Bell*, 12 *Abb. [N. S.]*, 171; *Talcott* agt.



---

Handley agt. Quick.

---

*Rosenburgh*, 8 *Abb.* [*N. S.*], 287). There is considerable evidence to show that the defendant could not, after due diligence, be found within the state. It is positively averred in each of the plaintiff's affidavits, on personal knowledge, that the defendant was a non-resident and his actual place of residence abroad is given. It is also averred in terms that "the defendant cannot, after due diligence, be found within this state, he *now being*, as deponent is informed and believes, at or near Milford aforesaid," his place of residence. It is then stated in the affidavit of the attorney "that he had sent to the sheriff of Orange county (which adjoins the county of the defendant's residence in Pennsylvania) a copy of the summons and complaint in this action, to be *served* upon said defendant *if he could be found*, \* \* and had received a telegram from the sheriff stating that he had been *unable* to serve said summons." I think this evidence makes a stronger case than was made in *Van Wyck agt. Hardy*, and sustained in the court of appeals (39 *How.*, 392); and is quite as strong as that which was held sufficient by the general term in *Waffle agt. Gable* (53 *Barb.*, 517). It is apparent, from the opinion of the court in *Peck agt. Cook* (41 *Barb.*, 549), that the decision in that case would have been the other way, if the affidavit after showing the defendant's non-residence, had not stated that "he frequently visited the county of Livingston," in this state; a fact which was held to impose on the plaintiff greater effort to find him and to require more evidence that he could not be found, than would otherwise have been necessary. However that may be, such is clearly the construction to be given to that opinion, in the light of the later decision made by the same court in the case of *Waffle agt. Gable* (53 *Barb.*, 517).

There is more difficulty with the other question, whether the defendant had any property within this state. It is averred in the affidavit of each plaintiff that the "defendant has, as deponent is informed and believes, property within this state, to wit, money deposited in certain banks in the

---

Handley agt. Quick.

---

village of Port Jervis;" that the plaintiff has procured an attachment in the action against the defendant, "and has since been shown a letter from the sheriff of Orange county, dated June twenty-seventh, stating that he had on that day attached \$13,000 in the First National Bank of Port Jervis and \$15,000 in the National Bank of Port Jervis, under the said attachment against said Peter A. L. Quick." This, it is true, is quite inconclusive proof, but is some evidence having a tendency to prove the fact sought to be established. The affidavits distinctly aver, on information and belief, the existence of the fact, and then relate a circumstance, of which they have been informed and the source of their information, having a tendency to prove it, but do not state whether this is all the information they have on the subject. I think this was barely sufficient to enable the officer to pass upon the question; and there being evidence, which the county judge held was satisfactory to him, that the defendant had property in the state, the orders of publication should not now be set aside. In *Evertson agt. Thomas* (5 How., 45) there was no evidence on this point, but the bare allegation made on information and belief. It is doubtless true that this is a fact the actual existence of which is essential to the jurisdiction of the court, but this would be equally true even if the fact were positively alleged on the personal knowledge of the affiant. Such *ex parte* proof, however clear on its face, would not be conclusive; and if it should finally turn out that the affidavit was false, and the defendant in fact had no property in the state when the orders were made, the judgments would be void (*Fisk agt. Anderson*, 12 Abb., 8). Whenever, then, a *prima facie* case on this point is established by the papers, the orders should be sustained. Even in a case of doubt, I should be disinclined to dispose of this question in this summary way. The plaintiffs have attached this property, claiming it as the property of the defendant; and if there is a reasonable ground of dispute over the question of ownership, the plaintiffs should not be deprived at

---

Handley agt. Quick.

---

the outset, and beyond recall, of all the fruits of the litigation. A sheriff's jury may be called if the property should be claimed by a third person, and the facts bearing on the question of title be thus ascertained; or, in the event of the property being sold on the final judgments and executions, the claimant may test the validity of his title by a new action against the plaintiffs or against the sheriff for wrongfully seizing it. The defendant, at least, is not particularly interested in that question, as he cannot be harmed if the property does not really belong to him.

The motions must be denied, but, under the circumstances, without costs, as the plaintiffs should receive no encouragement to continue this practice.

NOTE.—The foregoing orders were affirmed on appeal by the general term, third department, June 1874.

---

The defendant also moved separately at the same special term, on new affidavits, to set aside the orders of publication in these actions, on the ground that the defendant in fact had no property in the state when the orders were granted, and upon these motions a large number of affidavits were read *pro* and *con.* bearing on that question.

*David B. Hill*, for the motions.

*George M. Diven*, contra.

COUNTRYMAN, J.—I have carefully read the voluminous affidavits upon which these motions respectively are made and opposed, and the result has been a very decided impression that the proceedings of the defendant from the outset, in regard to the property in question, have been taken in bad faith merely to avoid the payment of his indebtedness to the plaintiffs. It is quite evident that he originally deposited the money in the Port Jervis banks, in this state, in order to



---

Handley agt. Quick.

---

place it beyond the control of the courts of Pennsylvania, and I cannot resist the conclusion that his subsequent transfers (doubtless formally made precisely as he has deposed) was a fraudulent contrivance to place the property again, if possible, beyond the reach of the plaintiffs as suitors in the courts of this state. It would be a cause of deep reproach upon our methods of administering justice, if such an artifice should be permitted to succeed. But without reference to the main items of \$13,000 and \$15,000 respectively, for which certificates of deposit were given by the banks to the defendant, which he claims to have since transferred to his father-in-law, it now appears that there was sufficient property of the defendant in this state, the title to which is not in question, to uphold these proceedings. The sheriff swears that he also attached, in addition to the above amounts, the sum of \$102.72 in money belonging to the defendant, on deposit in the First National Bank; and there is no pretense, even in the moving affidavits, that this money was not his property. These motions, therefore, must also be denied, with ten dollars costs.

---

Watson agt. Watson.

---

## SUPREME COURT.

JAMES S. WATSON, respondent, agt. ELIZABETH WATSON,  
appellant.

• *Divorce—decree—application to set aside for fraud.*

On an application to set aside a decree of divorce for fraud and irregularity in obtaining it, after the death of the plaintiff, the remedy is by an action in the nature of a bill of review, bringing before the court all the heirs-at-law and other persons interested in the real estate left by the decedent, and such persons as may have taken conveyances thereof subsequent to the decree, as well as the representatives of the decedent.

An application on motion and on notice simply, to the administrator of the plaintiff's estate, is not sufficient.

*N. Y. General Term, March, 1874.*

This is an appeal from an order of the court at special term, denying the motion of defendant to set aside a judgment of divorce, entered September 3, 1863.

*H. F. Averill*, for appellant.

*James M. Smith*, for respondent.

DAVIS, *P. J.*—The plaintiff, who obtained the divorce, died in the fall of 1872, intestate; and the motion is now made upon service of papers upon his administrator. The grounds are fraud and irregularity. If the facts stated in the moving papers be true, there certainly ought to be some relief for the defendant; but the question before us is, whether that relief can be obtained on motion, and on notice simply to the administrator of the estate. We think

---

Watson agt. Watson.

---

it cannot. No authority is cited for such practice. The administrator has no power to consent to the setting aside of the judgment. He has no control or authority over it. There is no pecuniary recovery to be enforced by him. The decree simply dissolves the marriage relation and disposes of the custody of the children, both of which are questions in which the administrator, as such, has no legal interest whatsoever. It is said that he is interested in the question whether the defendant is entitled, as widow, to a distributory share of the estate, or is cut off therefrom by the judgment of divorce; but in that question, as administrator, he has no legal interest. The distribution, after payment of debts, &c., is made by decree of the surrogate, and the representative cannot properly be said to have any legal interest, whether the decree shall award the whole to the children of the intestate, or distribute a portion to defendant. We cannot avoid the conclusion that the motion was properly denied. An action in the nature of a bill of review, bringing before the court all the heirs-at-law and other persons interested in the real estate left by the decedent, and such persons as may have taken conveyances thereof subsequent to the decree, as well as his representatives, seems to us the only mode in which the relief sought can properly be obtained.

The order must be affirmed.

DANIELS and WESTBROOK, JJ., concurred.

VOL. XLVII

31



Patterson agt. Patterson.

SUPREME COURT.

JANE PATTERSON, Executrix, &c., agt. WILLIAM G. PATTERSON.

*Action for mortgage foreclosure—offset—not allowed.*

In an action by an executrix to foreclose a mortgage for moneys which became due after the death of the testator, the defendant cannot offset any debt due from the testator to him, although the offset existed at the time of the testator's death.

*Special Term, February, 1873.*

VAN BRUNT, J.—This is an action to foreclose a mortgage given as collateral security to a bond conditioned to pay within four months after the death of one William Patterson, if he should die after the 9th day of June, 1870, and before the 9th day of June, 1875, to his executrix or administratrix, the sum of \$1,000.

William Patterson died on the 6th day of February, 1872, leaving a will, in which the plaintiff was appointed executrix thereof, and letters testamentary thereon were issued to the plaintiff on the 7th of May, 1872.

By his answer, the defendant claims to offset in this action certain debts due from William Patterson in his lifetime to him, and also the funeral expenses of William Patterson, which were paid by the defendant. The existence of these debts was duly proved by the defendant at the trial.

The plaintiff insists that they cannot be offset against the plaintiff's claim in this action, because the plaintiff's demand arose after the death of the testator. The case of *Merritt agt. Seaman* (6 N. Y., 168) seems to me to decide the precise question, and the court does not put the decision, as was

---

Patterson agt. Patterson.

---

claimed upon the argument of this case, upon the ground only that the words "executor, &c.," are merely a *descriptio personæ*, and the suit is to be considered as one brought by an individual plaintiff. The first ground upon which the case is decided is distinctly stated to be that the offset could not be allowed, because the claim sued upon arose after the testator's death, notwithstanding the offset existed at the death of the testator.

The cases cited in *Merritt* agt. *Seaman* also fully sustain the position of the plaintiff.

The plaintiff must have judgment of foreclosure and sale.

---

Menges agt. City of Albany.

---

## SUPREME COURT.

PHILIP MENGES agt. THE CITY OF ALBANY.

*Taking private property for public use—unconstitutional act of 1870 in reference to the city of Albany.*

According to the provisions of the constitution of this state (*art. 1, § 7*), when private property is to be taken for public use—the opening of streets, etc.—*compensation* must be made by means of a jury, or by not less than three commissioners, appointed by a court of record, as shall be prescribed by law.

The act of 1870, chapter 77, which relates to the city of Albany, and certain provisions of section 1 of title 7 of said act (*Sess. L., 1870, pp. 159, 179*), providing for proceedings to take the real estate belonging to any person for the purpose of laying out and opening any street, etc., requires the common council to nominate twelve discreet and reputable persons, freeholders, etc., and to apply to the supreme court, or any judge thereof, or the recorder of said city, for the appointment of three commissioners from the persons so nominated; and said judge or recorder shall proceed to draw from a box, containing, on separate ballots, the names of the persons so nominated, the names of three persons, who, unless objected to or challenged, etc., shall be commissioners, for inquiring, assessing and apportioning the damages to the owners of the property required to be taken.

*Held*, that this enactment is in direct violation of the seventh section of the first article of the constitution aforesaid.

The appointment of the three commissioners which the constitution contemplates is to be made by the court of record, or a judge thereof exercising *judicial discretion*; not by a ministerial act, in drawing three names selected by the common council from twelve ballots deposited in a box.

And where three commissioners have thus been drawn in pursuance of the act, and have performed duties as such commissioners under the act, they cannot be tortured into a *jury* for the purposes required by the constitution. A constitutional jury, in such case, requires more than



---

Menges agt. City of Albany.

---

three men, even if they were regularly drawn and in other respects unobjectionable.

*Albany General Term, March, 1873.*

MILLER, P. J., DANIELS and DANFORTH, JJ.

THIS case comes before the court upon a submission under section 372 of the Code.

The plaintiff is the owner of certain real property in the city of Albany. On the 17th day of April, 1871, the common council of the defendant passed resolutions for the opening, continuing and widening of First street, and nominating twelve men, named in the resolutions as "respectable and disinterested freeholders," as the persons from whom commissioners should be selected for inquiring into, assessing and apportioning the damages and recompense of the owners of the property to be taken.

The common council thereupon caused to be published a notice of application to the supreme court for the appointment of three commissioners, and on the 26th day of December, 1871, the day named in the notice, the court drew from a box, containing, on separate ballots, the names of the persons so nominated, the names of three persons, as commissioners, and made and entered an order reciting the proceedings and appointing as commissioners the three persons whose names were so drawn. The lands described in the resolutions and order included a portion of the real property of the plaintiff mentioned in the case.

The commissioners proceeded to assess the damages and recompense to which the owners were entitled, and also to apportion and assess such damages and recompense upon the owners of the property to be benefited by the public use of the ground. They awarded to the plaintiff \$1,488.24. The total damages awarded, with the costs, charges and expenses, amounted to \$39,163.07. Of this amount the sum of \$3,389.06 was assessed upon the plaintiff, as owner of land

---

Menges agt City of Albany.

---

to be benefited. The inquisition and return, made and returned by the commissioners, was, on the 18th day of March, 1872, confirmed by order of the court at special term.

The plaintiff refuses to pay the assessment upon him. The defendant threatens to enter upon the plaintiff's lands and throw them open to the public as a highway or street, and also threatens to advertise for sale the lands assessed, and to collect and enforce the same. It is conceded that the proceedings threatened by the defendant, if illegal and void, would cause injury to him, cast a cloud upon his title, and involve him in a multiplicity of suits.

The defendant justifies its proceedings under chapter 77 of the Laws of 1870, title 7, section 1 (1 *S. L.*, 1870, *p.* 179).

The plaintiff claims that the law referred to is unconstitutional and void, and that the resolutions, orders and proceedings are illegal, and impose no legal burden or valid lien on the plaintiff, and do not justify the defendant in entering upon the lands of the plaintiff, and of appropriating and using the same as a public street.

*Matthew Hale*, for plaintiff.

*N. C. Moak*, for defendant.

MILLER, *P. J.*—The questions to be determined in this case affect the constitutional validity of chapter 77 of the Laws of 1870, which relates to the city of Albany, and of certain provisions of section 1 of title 7 of said act (*S. L. of* 1870, *pp.* 159, 179). The section referred to first provides for proceedings to take the real estate belonging to any person or persons for the purpose of laying out, opening, etc., \* \* \* “any street,” \* \* \* “or for any other public purpose or use,” and for the publication of notice specifying the ground required, and the time and place at which the damages and recompense to the owner or owners

---

Menges agt. City of Albany.

---

will be inquired into, assessed and apportioned, and assessed among the owners and occupants of real estate to be benefited by the intended public use of the ground, and, among other things, enacts as follows :

“ And the said common council shall nominate twelve discreet and reputable persons, who shall be freeholders of the said city and in no wise interested in the questions of damages and recompense and the apportionment and assessments thereof, and make application to the supreme court, or any judge thereof, or the recorder of said city, for the appointment of three commissioners from the persons so nominated as aforesaid ; and thereupon the said court, or judge or recorder, shall proceed to draw from a box, containing, on separate ballots, the names of the persons so nominated as aforesaid, the names of *three persons, who, unless objected to or challenged* on the ground of interest or qualifications, shall be commissioners for inquiring into and assessing and apportioning the damages or recompense of the owner or owners of the property required to be taken ; and in case any *challenge*, which shall be taken as aforesaid, shall be deemed valid by said court, or judge or recorder, or in case any person so drawn shall fail to qualify or refuse to serve, another name or names shall be drawn from the said box in place of the person or persons so *challenged* and set aside, or failing to qualify or serve.”

It is insisted by the plaintiff's counsel that this enactment is in direct violation of the seventh section of the first article of the constitution of the state, which provides that, “ when private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the state, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law.” According to the requirement of this provision of the constitution compensation must be made by means of a jury or by commissioners. Under the law in question the common council are to nomi-



---

Menges agt. City of Albany.

---

nate twelve persons; and upon an application being made to the supreme court or a judge thereof, or the recorder of the city, for the appointment of three commissioners from the persons nominated, they are to be drawn from a box, and these or others, in case of challenge, selected in the same manner, are to constitute the commissioners.

It is plain, from a perusal of the statute, that the duty enjoined upon the court, judge or officer, in thus drawing the names of the persons selected, is ministerial, and does not require the exercise of any judgment or discretion in reference to the qualifications of the persons who are to be selected. The constitution provides for the appointment of commissioners, and it is difficult to see how the appointing power can be properly and lawfully exercised unless it is vested with complete authority in the selection of persons who are to be appointed. This is an essential and an indispensable element, and without it no appointment can be made. A drawing, by mere chance, from names which had been previously selected, in pursuance of other and different authority, would be entirely inconsistent with the design of an appointment. The former mode depends entirely upon chance alone, while the latter necessarily requires the employment of the faculties and the exercise of the judgment in making a choice as to the fitness and qualifications of the persons who are to be selected.

That the mode indicated by the law in question for the selection of commissioners is in violation of the constitution, has also been held in cases where the same provision has been presented for interpretation.

In *House agt. The City of Rochester* (15 Barb., 517), the charter of the city authorized damages to be assessed by three assessors, assigned by the common council, and it was held to be in conflict with the constitution and unauthorized and void. In the case cited, the common council selected the assessors, while here they nominate the persons from whom they are drawn. The difference is exceedingly slight between

---

Menges agt. City of Albany.

---

the case cited and the one at bar; and the fact that a judge or court is to draw the three commissioners from the names selected does not, in my opinion, obviate the difficulty or give validity to the law in question.

In *Clark agt. The City of Utica* (18 Barb., 451), the charter provided that, when lands of individuals are taken for streets, the common council might appoint five disinterested freeholders to ascertain and report the recompense to be made, and it was held that the provision was in conflict with the constitution; that no appointment of commissioners by a court of record was provided for in the case, and that the persons designated did not constitute such a jury as the constitution contemplates. Both these cases are authority for the doctrine that commissioners must be appointed by the court, and cannot be chosen in any other manner.

The same principle is upheld in *Cruger agt. The H. R. R. Co.* (2 Kern., 190); and JOHNSON, J., holds, at pages 197 and 198, that appraisers provided for in the act amending the charter of the Hudson River Railroad Company (*chap. 31, S. L. of 1847*) are not commissioners appointed by a court of record, within the meaning of the constitution, and that the language employed implies that the commissioners are to be selected by the court, in the exercise of their discretion and judgment, in regard to their fitness to perform the duties which will devolve upon them. He remarks: "Providing for a selection by lot and an appointment thereon, would amount to an evasion of the object of the constitutional provision." Having in view the object of the constitutional provision now considered, and looking at its plain import, it cannot, I think, be claimed, upon any rational hypothesis, that the persons chosen by lot in this case, and as provided in the section cited, were duly appointed commissioners, or had any authority to act as such, in accordance with the requirements or within the spirit and meaning of the constitution.

Upon the part of the defendant it is also claimed that the

---

Menges agt. City of Albany.

---

legislature had power to provide that the compensation should be determined by a jury of less than twelve, or even less than six, and may constitutionally provide that the assessment by a majority of such jury of six shall be valid; and hence it is argued that it is of no importance whether the persons drawn are called commissioners or jurors; and that the three commissioners named may be considered as a jury regularly selected within the constitutional provision cited. Under the constitution of 1822, which contained no provision as to the mode of ascertaining compensation, but simply provided that private property should not be taken for public use without just compensation (*art. 7, § 7*), it was decided that it might fairly be presumed that the framers of that instrument intended to leave that subject to be regulated by law, as it had been before that time, or in such manner as the legislature might deem best (*Beekman agt. S. and S. R. R. Co., 3 Pa., 45, 75; Livingston agt. The Mayor of New York, 8 Wend., 102*).

The constitution of 1846 entirely changed the matter and restricted the legislature, so that either commissioners should be appointed or a jury selected. Where provision is made for commissioners, it is not manifest upon what principle they can be transposed into a jury. It is not enough to say that it makes no difference by what name they are denominated, so long as they are designated as commissioners, with some of the surroundings of a jury, and are appointed as such commissioners. I am at a loss to see how they can be considered, in any sense, as constituting a jury. Some remarks were made in *Cruger agt. H. R. R. Co. (2 Kern., 190)* to the effect that a common-law jury of twelve men was not required for a jury of appraisal, and that the term "a jury" did not necessarily embrace twelve men; and numerous acts of the legislature are cited to show that even six may be drawn for the purpose of appraising damages in certain cases, a majority of whom may make the certificate, and who are called indifferently throughout the



---

Menges agt. City of Albany.

---

various acts jurors and appraisers and a jury of appraisers. In all the cases to which the learned judge referred, not less than six persons were named, and in no case has it ever been held that the term "jury" was applicable to three persons, especially when those persons are designated as "commissioners." The observations made were not necessary to the decision of the case last cited, and it was decided upon another and a different ground; but, under the circumstances, they cannot be regarded as having any bearing whatever upon the case now considered, as the law in question bears no analogy to the acts which are cited. It would be an anomaly in legislation to authorize three persons to constitute a jury, and to vest the power to act in a majority, two of these; and it is, in my opinion, a complete and conclusive answer to the position taken, that the law makes no *provision whatever for a jury* in this case, but expressly enacts that application may be made for the *appointment of commissioners*. It authorizes the common council to select the persons from whom the commissioners shall be drawn—a most extraordinary proceeding for the selection of a jury—and, so far as we are furnished with authority, without any precedent. It furnishes no opportunity to the parties interested in the real estate affected to participate in the selection of the persons originally nominated, thus leaving their choice entirely in the hands of the members of the common council. It is true that objection may be made or a challenge interposed when the three commissioners are drawn, but this might be of little avail when the officers of one of the parties had, in the first instance, nominated the entire body from which the drawing was to be made.

The whole proceeding bears upon its face infallible indications that commissioners were to be appointed and no jury selected. The resolution of the common council nominates twelve persons "from whom commissioners shall be selected," and directed the corporation counsel to make application "for the appointment of three commissioners;" and the judge

---

Menges agt. City of Albany.

---

ordered that the persons named "be and they hereby are constituted and appointed commissioners." They acted and made an inquisition and return as "commissioners," and the order confirming their action designates them as "commissioners drawn and appointed." It is thus established by the act itself, by the assent of the parties and by all the proceedings, that commissioners were appointed and that no jury was ever chosen or intended to be selected. The provision in the law, that the commissioners are to "make and return" \* \* "an inquisition in writing of the amount of damages and recompense which they shall assess," etc., and the subsequent use of the word "inquisition," cannot be considered as contradicting the plain import of the act and the phraseology employed. This word is frequently used in connection with other matters besides the finding of a jury, and is appropriate when applied to commissioners appointed to inquire and make an assessment of damages incurred in proceedings of this character.

As no commissioners were appointed, and no jury selected as required by the constitutional provision in question, it follows that the proceedings were unauthorized and void. It is, therefore, unnecessary to discuss the question raised whether the act was passed in violation of section 16 of article 3 of the constitution.

The conclusion is inevitable that the plaintiff is entitled to a judgment upon the question submitted for determination, with costs.

DANIELS and DANFORTH, JJ., concurring.

Affirmed in the court of appeals.

---

Tim agt. Tim.

---

## SUPREME COURT.

IRENE TIM agt. SOLOMON TIM

*Indefinite and uncertain pleadings in action for divorce on the ground of adultery.*

The rule as to the time, place and person with whom adultery is alleged to have been committed.

The defendant, in his answer, averred that the parties with whom the adultery was committed are unknown to him. Neither did he state the times or places. *Held*, that while he was, perhaps, warranted in not giving the names of the persons because unknown to him, he is not warranted in omitting to state the times and places at which the offenses were committed.

Irrelevant and redundant matter as defenses in such actions.

*New York, Special Term, July, 1874.*

MOTION to make fifth paragraph in answer more definite and certain, "by stating time and the name or names, and street or streets, or place or places, and the exact dates, with whom and where and when plaintiff has openly and notoriously prostituted herself for hire."

The complaint was in the usual form by wife against her husband for a divorce, *a vinculo*, on the ground of his adultery. The answer contained eight defenses; among others, that plaintiff was not his wife, and that he was never married to her, and denying any act of adultery on his part. The *fourth* defense alleged that the plaintiff's name was not Irene Tim, but was Irene Ashton. The *fifth* defense was as follows: "That, on the 20th day of March, 1869, the plaintiff was and ever since has been a common and notorious prostitute, and has, during all that time, openly and notoriously



---

Tim agt. Tim.

---

prostituted herself for hire, and has, during all that time, at divers places in the city of New York, committed adultery with divers men, but with what particular men, or at what particular places in said city, this defendant is now unable to state more definitely. The *sixth* defense was an admission by defendant that he had committed "adultery" with the plaintiff, but that she was his mistress and not his wife, and that he had never held her out as such to the world, but that all his friends and acquaintances knew plaintiff to be his mistress and not his wife. The *seventh* defense alleged that he was engaged to be married to a very respectable young lady, of first-class standing in society, and the plaintiff becoming aware of the same, threatened to expose defendant's "adulterous" intercourse with her, and he, fearing exposure, paid her the sum of \$800, and obtained from her a general release of all claims.

The *eighth* defense charged that the action was only brought to extort money. Upon motion, justice DONOHUE struck out the fourth, sixth, seventh and eighth defenses, as irrelevant and redundant, holding that there were but two questions under the pleadings which were properly in issue, and material: *First*. Was the plaintiff the wife of the defendant? *Second*. If she was, did plaintiff or defendant, or both, commit adultery? The motion to make the *fifth* defense more definite and certain is now made.

*George F. and J. C. Julius Langbein*, for plaintiff, for the motion.

*William F. Howe*, for defendant, opposed.

LAWRENCE, J.—The fifth paragraph of the answer must be made more definite and certain by stating the times when and the places at which the plaintiff committed the alleged adulteries.

The adultery of the plaintiff must be set up in an answer

---

Tim agt. Tim.

---

in the same manner, and must be accompanied with the same allegations as are required when the defendant is charged in a complaint with the commission of adultery (*Monnell* agt. *Monnell*, 3 *Barb.*, 236; and see *Anonymous*, 17 *Abb.*, 48).

In *Hyde* agt. *Hyde* (4 *Sand.*, 622), an allegation "that the defendant, in November, 1851, committed the offense in the city of New York, with a female whose name is unknown to the plaintiff, and the particular circumstances of which are unknown to the plaintiff," was held to be insufficient, and it was further held, "if the person be unknown, the complaint should state specifically the place where the offense occurred, and at a house specified, or the like." In this case the defendant avers that the parties with whom the adulteries alleged were committed are unknown to him, and, under the authority just cited, he is perhaps warranted in making the allegation, in that respect, in the form in which it is made, but he is not warranted in omitting to state in his answer the times and places at which the offenses were committed.

Motion granted to the extent above stated, with ten dollars costs of motion.

---

Keeley agt. Erie Railway Company.

---

## SUPREME COURT.

EDWARD KEELEY, Administrator, &c., of JOHN KEELEY,  
deceased, agt. THE ERIE RAILWAY COMPANY.

*Action under the statute — negligent killing — nonsuit.*

In an action brought under the statute for the negligent killing of plaintiff's intestate while a passenger on defendant's road, the evidence showed conclusively that there was no negligence or want of proper care, on the part of the defendant, in the management of their road or in running their cars at the time of the accident, but the evidence was clear and convincing to establish the fact that the *misplacement of the switch* which caused the accident by which the death ensued, was done by some evil-disposed person, not connected with the road, shortly preceding the arrival of the train in the night-time :

*Held*, that the plaintiff's *nonsuit* at the circuit, upon such evidence, was clearly correct.

*Albany General Term, March, 1873.*

MILLER, P. J., DANIELS and DANFORTH, JJ.

EXCEPTIONS ordered to be first heard at general term.

The action was brought under the statute for the negligent killing the plaintiff's intestate. The deceased was a passenger on a freight train upon the defendant's railroad going west, and was killed at Tioga Centre in a general smash up of the train caused by the displacement of the switch rails, which occurred July 30, 1870. The answer alleges, as a defense, "that the injury mentioned in the complaint as having occurred to the plaintiff's intestate was occasioned by the *willful and wrongful act of some third person*, and not by any negligence on the part of the defendant."



---

Keeley agt. Erie Railway Company.

---

The case was tried at the Tioga circuit, in March, 1872, before Mr. justice MURRAY and a jury.

At the close of the plaintiff's testimony a motion was made for a nonsuit, which was denied. At the close of the whole evidence the defendant's counsel renewed the motion for a nonsuit, and asked the court to direct a verdict for defendant upon each of the grounds specified at the close of the plaintiff's case.

The court granted the nonsuit on the ground that the evidence shows the rail was displaced by some unknown person by design, and there is no evidence of negligence of the defendant in not guarding against and discovering the same.

The plaintiff's counsel asked the court to be allowed to go to the jury upon the following propositions: In the first place, that there is no evidence in the case that the displacement of the switch, or that this accident, was caused by the willful conduct of any third party; second, that the evidence shows that the accident was caused by the negligence, want of care and prudence of the railroad company; third, that if the accident was caused by some evil-disposed person, that it is proved the company did not exercise that degree of care, foresight and caution which the law requires them to exercise in order to discover the act of the villain, and thus prevent the accident; fourth, to go to the jury upon the question as to whether the switch and its apparatus were of the most approved character with reference to the security and safety of the passengers on the trains on this railroad; fifth, upon the question as to whether the pin at the fulcrum of the switch was of a proper size and properly secured, as well against design as against accident; sixth, upon the question as to the credibility of the witnesses as to the explanations for this accident which are offered by the defendant; seventh, upon the question generally as to whether this accident was the result of accident or design. Also, to submit to the jury the question as to the want of care and vigilance of the company in not providing a switchman or some person to take care of and guard

---

Keeley agt. Erie Railway Company.

---

this switch. Also, to submit the proposition to the jury that there is affirmative proof in the case that this accident was not the result of design, from the circumstance that this pin, spoken of in the evidence, was found upon the head-block, and the washer hung upon the handle of the switch. Also, that no villain, accomplishing his work, would thus advertise his villainy; that the inference to be drawn from it is that it was the work of some one, connected with the railroad, finding those articles lying on the ground after accidental displacement, placed them in those positions for the purpose of preservation. Also that, by the action of the cars, ordinarily, as it is proven in this case, in time the pin might have become displaced and fallen out, and the washer off, and the rails thus become accidentally misplaced. Also, that there is evidence, generally, to submit to the jury on the question of the defendant's liability.

The court refused each of the requests of the plaintiff, and the plaintiff's counsel duly took exception to the ruling upon each separately, and also duly excepted to the ruling granting the nonsuit.

At the close of the trial the counsel for the plaintiff asked the court for an order staying further proceedings upon the nonsuit entered, and for time to make and settle a case and exceptions for the purpose of an appeal from the judgment which might be entered on the order for the nonsuit. The court thereupon made, and directed the clerk to enter, the order providing for a motion for a new trial, in the first instance, at the general term, as appears in the minutes of the trial hereinbefore given; and this case is made pursuant to such order and direction.

The material facts are stated in the opinion.

*F. W. Hubbard*, for plaintiff.

*O. W. Chapman*, for defendant.

---

Keeley agt. Erie Railway Company.

---

MILLER, *P. J.*—The plaintiff made out a case presumptively after he had proved that the intestate was a passenger, and that the accident was caused by the displacement of the switch. The burden of showing a want of responsibility then rested with the defendant; and the allegation of criminality, on the part of some one not connected with the defendant, by intentionally deranging the switch and thus causing the disaster, should have been satisfactorily established to justify a nonsuit, and to authorize the court to take the case from the jury.

The plaintiff's counsel insists that the criminality of a person not connected with the road cannot be established by presumption merely, but must be proved with certainty, so as to dispel every other hypothesis. This is, no doubt, the rule (*Edgerton agt. N. Y. and H. R. R. Co.*, 39 *N. Y.*, 229); but this salutary principle does not, I think, go to the extent of demanding proof by an eye witness of a criminal transaction which is usually perpetrated in secret, and which no human being but the actor can positively know. Such a fact, like many others, may be established by circumstances, which are often as strong and convincing as direct testimony, and which lead to the same inevitable conclusion.

The evidence shows that the switch was last used before the accident about five o'clock in the afternoon, when it was left all right with the rails in their places. The switch-handle was locked and the hasp or clasp which is used to secure the neck-rod from getting out of place was down, and the wooden pin to keep the hasp or clasp down driven in with a stone, so that it could only be removed with difficulty. The neck-rod was connected with the crank of the upright rod with a pin underneath and a washer, which pin held both the washer and neck-rod in their places. This pin was split at the end, opened with an adz after it was put in, which made it fit so tight that it could not fall out of itself and could not be taken out except by the use of force. At 6 o'clock in the evening a hand-car went over the track and the switch was all



---

Keeley agt. Erie Railway Company.

---

right. About 8 o'clock the night track-walker upon this beat examined the switch carefully in accordance with his usual custom and instructions; at 8.34 a train passed with safety, being the last one which passed; at 9.47, everything, so far as known, was safe and in good condition, and any change, therefore, in the switch, by which the train was thrown off the track, must have occurred between the two last-named periods.

The proof also shows that, after the accident, the iron pin and washer, on the end of the crank, instead of being found under the switch-gate, where only they would have fallen if they had accidentally worked out, were found, the one on the head-block and the other slipped over the switch-handle, and the hasp turned up over back, and the wooden pin, which had been driven in with force, was gone.

Upon this staté of facts it is difficult to see how it can well be argued that the switch could have been displaced by the accidental loosening of either of the pins or the movement of the cars. If so, why was the iron pin and washer in the place where it was found; and what had become of the wooden pin which was gone? It would appear to be almost impossible to remove either of these pins by any ordinary means, such as hitting them with the foot, as is suggested, or otherwise than by force; and if credible witnesses, unimpeached, are to be believed, then the conclusion is irresistible that some evil-minded person, with some object in view, had been tampering with the switch and caused the calamity.

Such being the case, the question arises whether the evidence establishes that the displacement was caused by the willful act of some third person, so as to authorize the court to take the case from the jury and to justify the nonsuit. The defendant had introduced as witnesses most of the persons who had in any way been connected with the railroad in the vicinity of the switch, or who had anything to do with it, and thus established by these witnesses entire innocence of any participation in the criminal act. True, all of the

---

Keeley agt. Erie Railway Company.

---

employees were not called, and it is insisted that one day-walker on the track was not sworn; that no reason is assigned why he was not, and that it does not appear that others employed on the road were called. The proof seems to include all, or nearly all, the workmen who could have had any duty to perform, and the omission to call a single one, or the omission to prove that none others were employed, except those called, unless accompanied by circumstances of suspicion alone, taken together, does not establish that the act may have been done by one of the employees. Such evidence at most would be only negative evidence, unless the witness or witnesses called examined the switch after the 8.34 train passed, which is not claimed. The interest of employees would naturally be to protect the company from accident, and the presumption would be strongly against their criminality. Evidence, therefore, that they did not willfully change the switch and cause the accident was not required, and from the circumstances surrounding the transaction the judge at the trial was justified in holding that the rails were displaced by some unknown person.

Upon the question of the defendant's negligence, the evidence showed quite conclusively that every means had been employed which prudence, skill and care required to guard against danger, and I think it does not appear that there was any omission, either in the means or character and capacity of the men employed in taking care of the switch or managing the train. The switch and pin and the crank and all the fixtures were of the most approved kind, the very best in use; and the testimony shows that, before the accident, spikes were used to make the switch more secure. There was nothing for the jury upon the question whether any better switch-key, headed or burred, might not have been used, as the testimony showed that the latter were not as good as those which were used, and more liable to get loose. Nor was there any question as to lights at the switch during the

---

Keeley agt. Erie Railway Company.

---

night, as the proof showed they were not of any advantage and were not generally in use.

The judge was clearly right in refusing to submit the various requests made by the plaintiff's counsel to the jury, and in granting the motion for a nonsuit.

The question put to the witness, Shea, as to his instructions to the track-walker "to examine both switches and take the locks and pull them to see if they locked," etc., was competent for the purpose of showing the exercise of proper care and vigilance.

So also the questions put to this and another witness as to the men being prudent, careful, etc., was properly received upon the same ground. As, however, the plaintiff failed, upon the whole evidence, to sustain his action, it is of no consequence whether the testimony was competent.

There being no error, a new trial must be denied and judgment ordered for the defendant, with costs.

DANIELS and DANFORTH, JJ., concurred.



---

 Crofut agt. Brandt.
 

---

## COURT OF APPEALS.

ANDREW J. CROFUT *et al.* (MATTHEW T. BRENNAN, Sheriff, appellant) agt. JOHN BRANDT, respondent.

*Sheriff's fees.*

The sheriff is restricted to the fees given to his office by statute. He is not entitled, on execution, to expenses paid to keepers, nor charges for cartage or storage, nor insurance, nor for any other expenses incurred by him not expressly allowed by statute.

Whether, if he incurs any expense for the benefit or convenience of either of the parties, and upon the promise to repay him, he can recover such expenses of that party, *quere*.

*June, 1874.*

THIS was an appeal from an order of the general term of the court of common pleas for the city and county of New York, affirming an order of judge ROBINSON taxing the sheriff's fees.

The plaintiffs recovered a judgment against the defendant in the marine court for \$989.31; a transcript thereof was filed in the office of clerk of the city and county of New York; execution was issued out of the court of common pleas and the sheriff levied upon the defendant's goods. No sale took place, and the defendant, having paid the judgment, applied to have the sheriff's bill taxed. The sheriff made the following charges:

1. Poundage on an execution \$989.31 .....	\$25 98
2. Levy and return .....	2 69
3. Expenses keeping and watching property when levied on .....	150 00
4. Labor boxing property, &c. ....	20 00

## Crofut agt. Brandt.

5. Amount paid for cartage.....	\$110 50
6. Storage and insurance.....	45 00
7. For services preparing goods for sale, and catalogue on sale, and on refunding deposits on service of injunction.....	65 00
	<u>\$419 17</u>

Judge ROBINSON held the following fees taxable, and no others:

Poundage on \$989.31, and interest to August 16,	
\$997.21, on \$250 at $2\frac{1}{2}$ per cent.....	\$6 25
On \$747.21, at $1\frac{1}{2}$ per cent.....	9 35
Advertising sale of goods.....	2 00
Fee, after advertising and before sale.....	1 00
Receiving and entering execution.....	50
Travel, one mile .....	6
Return .....	13
	<u>\$19 29</u>

The opinions of the general term of the court of common pleas, on affirming the above taxation, are reported in 46 *Howard's Practice Reports*, 481.

*A. J. Vanderpoel*, for appellant.

*C. Bainbridge Smith*, for respondent.

FOLGER, *J.*—This case has been so elaborately considered in the three opinions delivered in the courts below, it is important enough to merit discussion here.

The appellant claims that his needful expenses in executing the process of the court, as its ministerial officer, should be reimbursed to him; that is a principle as old as the relation of master and servant. There is not a close analogy

---

Crofut agt. Brandt.

---

between the relation of a sheriff to the public and that of a servant to his master, still less that of an execution debtor. A master selects his own servant, and sets him about his work for his benefit at wages stipulated for between them. The public must take the officer whom the law has appointed for it, whether or not satisfied with him or with the amount of compensation the law has given to him. The execution debtor is subject unto him, and is proceeded against *in invitum*.

And on broader ground, too, the analogy is not found. Lord ELLENBOROUGH, Ch. J., says (*Graham agt. Grill*, 2 M. & S., 249) that the right of a sheriff is *positivi juris*, not in the nature of a claim for work and labor, and that many onerous duties are cast upon a sheriff, for which the law has not provided distinctly any remuneration.

Indeed, at common law, the sheriff was bound to perform his duty gratuitously, and if he was entitled to charge anything at all he must show his title under some act of parliament (*Dew, Esq., agt. Parsons*, 1 Chit., 295; 18 E. C. L. R., 87.) And so Comyn says (*his Digest, Viscount, f. 1*), that where the law imposes a duty upon an officer he cannot claim a remuneration for fulfilling it, unless the law has expressly conferred such right. In *Rex agt. Jetterel* (*Parker*, 117), though a sheriff was allowed his poundage on an "extent in aid," in favor of a receiver-general, his costs and charges were denied him. It is laid down in *Lane agt. Sewell* (1 Chitty Rep., 175), that where the service falls within the general duty of the sheriff, it is not necessary that he should have any remuneration. So in *Slater agt. Haines* (7 M. & W., 413), the sheriff was allowed his poundage and such fees as were prescribed by the table of fees, framed under certain statutes, and, although he was put to extra trouble and expense, he was refused more. To come to the particular items of the sheriff's bill of costs and charges in this case. It is held that he cannot demand the expense of keeping a man in possession. Thus, where the sheriff had received a



---

Crofut agt. Brandt.

---

*ca. sa.* against a defendant, and, on going to his house to execute it, found him in bed, being bedridden there for three years, and not to be removed therefrom without danger to his life, so that the sheriff needs must keep a man ever at the house, the sheriff could not legally discharge himself by a return that he had relinquished the custody of the defendant because he could not be removed without danger to his life (*Baker agt. Davenport*, 8 *D. & R.*, 606). Yet the expense of keeping the man in custody was growing near in amount to the sum of the execution. This was an extreme case; but the court refused to the sheriff more than to enlarge the time for the return of the writ (*See also Bilke, Esq., agt. Hoslock*, 3 *Camp. M. P. C.*, 274). It was also held extortion in the sheriff to charge the costs of a second man in possession (*Holliwell agt. Heyward*, 10 *W. R.*, 780, *Exch.*); which phrase of "a second man in possession" is explained by *Slater agt. Harris (supra)* *Gaskell agt. Sefton* (12 *M. & W.*, 801); and *Searle agt. Blaise* (18 *C. B. N. S.*, 56), from which it appears that by statute certain of the judges may prescribe a table of fees; and that, so doing, they did allow a charge for one man in possession. But the right to this was held to be so entirely dependent thereupon, that, in *Slater agt. Haines*, though by the violent conduct of the defendant (as was claimed) it was needful to employ an extra number of men for several nights to keep safely the goods, yet no charge was allowed therefor, save that of one man (*See also Davies agt. Edmonds*, 12 *M. & W.*, 31). Nor can the sheriff charge for the expense of labor in boxing the property levied upon (*Slater agt. Haines, supra*); nor, upon the same reason, for cartage of goods. So, the sheriff may not charge for the services of an auctioneer (*Rex agt. Cracken-thorpe*, 2 *Anstruthers*, 412; *Slater agt. Haines, supra*); nor for preparation of a catalogue or other preparation for sale (*Phillips agt. Canterbury*, 11 *M. & W.*, 619; *Holliwill agt. Hayward, supra*; *see also Searle agt. Blaise*, 14 *C. B. N. S.*, 856); nor for expenses by reason of an adverse claim to the

---

Crofut agt. Brandt.

---

goods (*Davies* agt. *Edmonds*, 12 *M. & W.*, 31; see also *Searle* agt. *Blaise*, *supra*); nor for an assistant (*Cooper* agt. *Hill*, 6 *C. B. N. S.*, 703). Whether he may charge for the expenses of insurance is doubted in *White* agt. *Madison* (26 *N. Y.*, 117-127). As it would seem to be the better opinion that if he used ordinary diligence in taking care of the goods, after coming into the possession of them, he would not be liable for losses by fire or other accident (*Browning* agt. *Handford*, 5 *Hill*, 588; but see 5 *Denio*, 586, *Jenson* agt. *Joliffe*, 6 *J. R.*, 9, and 9 *J. R.*, 381), it would also seem that he would have no right to charge for premiums paid for insurance. But the extent of his liability need not be passed upon here. He is no more, and just as much, liable for loss by fire as for loss by other accident. And if he may not charge for indemnity against loss by fire, and the same reason applies to the charge for storage, it is the duty of the sheriff, on receiving the writ, to proceed to levy it upon the goods of the defendant. When the goods are taken, it is his duty to preserve them from loss from wrong-doers, or from the elements, or from accident. The extent of diligence he must use therein, as we have said above, is not passed upon here. But whatever degree he is required to use, and whatever expense he is put to therein, comes under the same principle, that he must look to his poundage and statutory fees for his full compensation. Says *PARKE, B.*, in *Slater* agt. *Haines* (*supra*), "What is the sheriff to do for his poundage? He is not to receive it for doing nothing. He is sufficiently paid by it for ordinary incidental expenses, and he must take the risk of that." Nor is the burden upon the sheriff so great as is claimed. His responsibility is measured by the amount of property in his hands by virtue of his levy. The amount of goods under his levy is ordinarily measured by the sum indorsed upon his writ. So that his poundage keeps pace (not equal pace, perhaps) with the increase of liability. He is not required ordinarily to keep the property in his hands but a few days, so that the expenses for storage, insurance, custody,

---

Crofut agt. Brandt.

---

are not of long duration, and are commensurate with the value of the effects which he has seized. And in the long run the result, in the contemplation of law, is, that the fees for which the law prescribes are adequate compensation for the risk and expense incurred. And there is nothing known to us which indicates that the result is different in fact. And if it were not so, the policy of the law is, that its executive officers should go among the people to lay hands upon their property under every needful restriction against the temptation to eat out their substance by the increase, in magnitude or diversity, of the charges and expenses of official service.

Most of the cases above cited are from English books, but the current of decision in this State is not in other course (*See Hatch agt. Mann*, 15 *Wend.*, 44, *Court of Errors*; *Lynch agt. Meyer*, 3 *Daly*, 256; *see also Downing agt. Marshall*, 37 *N. Y.*, 380-388; *Benedict agt. Marriner*, 14 *How. Pr. R.*, 568; *Mallory agt. Supervisors of Cortland*, 2 *Cow.*, 531).

There are certain cases upon which the appellant relies as holding otherwise. In *Gallagher agt. Egan* (2 *Sandf. S. C. R.*, 744), the court allowed a fee to be paid to the sheriff for serving notice of object of action, while expressly stating that the law provided no specific fee for this service; and so did the court in *Benedict agt. Warriner* (*supra*), but it was allowed to the plaintiff as a disbursement for a necessary and legal service. It was not allowed as a sheriff's fee, *per se*, and as it was allowable to the plaintiff as a payment for a service performed, it mattered not to whom he had paid it, whether to an unofficial servant, or to a servant who, though he was an officer, did not perform the service as an officer, but as a private person.

There are also cases where a service has been performed for the public by officers, for which no fee has been distinctly prescribed, and yet compensation has been allowed therefor by the court. Such are *Bright agt. Supervisors of Chenango*



---

Crofut agt. Brandt.

---

(18 *J. R.*, 243), and *People ex rel. Hilton agt. Supervisors of Albany* (12 *Wend.*, 257). The first was the case of a county clerk who had advanced his money to procure books for the county clerk's office, in which to record deeds, &c., and to enter the common rules of the court of common pleas. It was held that he was entitled to be repaid. It was put upon the ground that the books became the permanent property, and were transmitted to his successors for the benefit of the county. In that view, he was as well entitled to be repaid as though he had made needful repairs to the public building occupied by him as a public office. On the same ground an allowance was made in *Doubleday agt. Supervisors of Broome* (2 *Cow.*, 533). He was also allowed for sending certain notices to judges and justices, a service required of him by law, for which no fee was prescribed. That also is put upon the ground of a benefit to the county. I am obliged to confess that this allowance is not so clear, and that in my judgment the conclusion is not in harmony with the decisions I have cited to sustain my views. And it is to be observed that SUTHERLAND, J. (2 *Cowen, supra*), intimated a doubt as to its soundness. The other case was that of a judge of the county court, who attended in pursuance of law, upon the drawing of jurors by the county clerk. No specific fee was allowed therefor. The court held that he was entitled to compensation. It seems to have been put upon the ground that the services had no connection with his judicial duties as judge, for it is said that his place could have been supplied by two justices of the peace. If this be the ground, it has no applicability to the matter in hand. For the sheriff here can rest his claim upon no ground other than that the services and charges for which he claims were in the direct performance of his duty, and necessary to the proper performance thereof. I do not find that the case has ever been cited or relied upon in any other decision. In *Wather agt. Sandys* (2 *Camp. M. P. C.*, 640), a distinction is not intimated between services rendered for the public and

---

Crofut agt. Brandt.

---

those for private persons, for which there is no compensation prescribed. *Smith agt. Birdsall* (9 *J. R.*, 328) declares that, where the law is silent as to particular services, the court, if they allow anything, must allow what is reasonable. The opinion is *per curiam*, is very short, and neither enters into the points raised by counsel (if any were made, for the names of counsel are not given), nor does it state clearly the question raised by the defendant. It is not easy to get at just what was the question presented to the court.

It is said that a verdict was taken for the plaintiff, who was a sheriff, for the sum of his charges for arresting an ex-sheriff on attachment, for contempt of court in not returning an execution. The verdict was subject to the opinion of the court upon the legality of the charges demanded by the plaintiff. The principal of them was the mileage, at nineteen cents per mile, and the expenses of going to and returning from Albany, twelve days, thirty miles per day, at fifty cents. Now, if the opinion of the court was to be had upon the legality of the sheriff making any charges at all, then the decision bears upon the question in hand. If it was only upon the legality of the amount of the items, or of the amount of each or of any item, and the right of the plaintiff to some compensation, and the liability of the defendant to pay the same were conceded, then it does not touch the question in hand. There is some reason to infer, from the report of the case, that it was the latter. The court says that the charges are reasonable and just, and no more than an indemnity. Not that they are legal in the sense that the plaintiff had the right to charge. It then says that the defendant appears to have been in contempt, and liable to the costs and expenses of the attachment. It then states that the habeas corpus act allows twelve and a half cents per mile for bringing up a person, and the charges also for taking him back, if remanded; seeming to compare that mileage and those charges with the items in the plaintiff's bill; and then it concludes: "Where the law is silent as to charges for particular services,

---

Crofut agt. Brandt.

---

the court, if they allow anything, must allow what is reasonable;" and judgment is given for the plaintiff. The report is extremely meager. If the case does not bear this interpretation it must be considered as anomalous. I do not find it cited in any subsequent case save in *Clapp agt. Van Epps* (3 *Wend.*, 430), which case does not throw much light upon it. In view of the repeated and definite decisions in England, and those in our own state, it cannot be relied upon as an intentional declaration of a different rule from that established by them. It is worthy of note that in *Crocker on Sheriffs* (second ed., p. 360, § 824, p. 478, § 1144) it is cited as an authority for a principle stated thus: "If no fee is prescribed by law for the particular service, and they (sheriffs, &c.) are not required to discharge the duty without compensation, then they are entitled to recover a reasonable compensation therefor." I am not aware, however, that the sheriff was not required to discharge the duty without reference to compensation.

I have not overlooked the citations made by the appellant from the Revised Statutes (2 *R. S.*, p. 650, § 2; *id.*, p. 652, § 1; *id.*, p. 622; *id.*, p. 653, § 5). I do not perceive that they affect the question.

It is suggested by the appellant that if a sheriff should seize beasts he would be obliged to provide them with food and shelter and care, and that he ought not to pay the expense thereof. There is a dictum in *Sly agt. Finch* (*Cro. Jac.*, 514) that if he take cattle and return that he has taken, and afterwards the cattle die for want of meat, he is answerable for the value returned; and in *Gaskell agt. Sefton* (14 *M. & W.*, 802) it seems to be conceded that under the English statute law, as it then was, the expense would be allowed him of keeping the cattle. But that question is not now here, and we intimate no opinion upon it.

The appellant claims that the sheriff's poundage should have been estimated according to the fees allowed by law upon executions from the marine court. The judgment was



---

Crofut agt. Brandt.

---

obtained in the marine court ; a transcript of it was filed in the county clerk's office. Then the judgment is to be deemed a judgment of the court of common pleas, and is to be enforced in the same manner (*Ginochio* agt. *Fizari*, 4 *E. D. Smith*, 227) ; that is, by an execution out of that court to the sheriff of the county. The sheriff is restricted to the fees given to his office by statute.

The court does not pass upon the question whether, if by the request and upon the promise to repay of either of the parties to the execution, and for his benefit or convenience, the sheriff shall incur expenses, he may not recover them of that party ; as to which, see *Caff* agt. *Johnson* (7 *J. B. Moore*, 518 ; 6 *id.*, 338). The case does not directly present that question. The affiant, Thorpe, comes short in his affidavit of fixing upon the defendant or his attorney, or any one shown to have authority to speak for either of them, such a request. It may be that the sheriff may be able to make proof of request and promise to him.

The order appealed from must be affirmed, with costs, but without prejudice to another presentment of the sheriff's bill for taxation on further affidavits, if he shall be so advised.

All concurred, except ANDREWS, J., not voting.

---

Trustees of Columbia College, N. Y., agt. Lynch.

---

## NEW YORK SUPERIOR COURT.

THE TRUSTEES OF COLUMBIA COLLEGE, N. Y., agt. ANNA W.  
LYNCH *et al.*

*Covenants running with the land.*

A plaintiff, in an action brought to restrain a defendant from carrying on any kind of trade or business on certain lands, must show a privity of estate between himself and defendant in order to move the court in his behalf, because, when the land sought to be charged by the covenant is not derived from the covenantee, the consideration for the covenant is foreign to the land, and the title of the covenantor and of those taking title from him is unaffected by the covenant.

*Special Term, March, 1874.*

THIS action is brought to enjoin the defendants from carrying on any kind of trade or business on certain lands in the city of New York.

The plaintiffs claim that the defendants have violated in that respect a covenant made by Joseph D. Beers, the original owner of the property, with the plaintiffs, and through whom the defendants derive title.

*G. D. Harrison and S. P. Nash*, for the plaintiffs.

*J. Townshend and E. L. Fancher*, for the defendants.

CURTIS, J.—This difficulty presents itself in regard to the plaintiffs' case. There is no privity of estate between the plaintiffs and any of the defendants. The defendants' title was not derived from the plaintiffs in any manner. The covenants of the plaintiffs, which are alleged to be the consideration of the covenant on the part of Mr. Beers, are not

---

Trustees of Columbia College, N. Y., agt. Lynch.

---

mutual or reciprocal, and do not restrain the plaintiffs or their grantees, but only seek to restrain their lessees and those claiming under their lessees.

The policy of the common law has always been to restrain the power of imposing burdens upon land by means of covenants, except in those cases in which an estate is transferred from the person by whom it is imposed. This has led to the principle that, where the land sought to be charged by the covenant is not derived from the covenantee, the consideration for the covenant is foreign to the land, and the title of the covenantor, and of those taking title from him, is unaffected by the covenant. It is only where there exists a privity of estate between the covenantee and the covenantor the covenant runs with the land (1 *Smith Leading Cases*, 4 *Am. ed.*, 158; *Spencer's case*; *Van Rensselaer* agt. *Smith*, 27 *Barb.*, 148; and affirmed in *Idem* agt. *Hays*, 19 *N. Y.*, 68, and in *Idem* agt. *Ball*, 19 *N. Y.*, 100; *Hurd* agt. *Curtis*, 19 *Pick.*, 459; 1 *Shep. Touch.*, 1 *Am. ed.*, p. 179, and note; *Till. Adams on Eject.*, 73; *Harsha* agt. *Reid*, 45 *N. Y.*, 418, 419).

Applying these views to the case under consideration, neither the title of Beers or of those deriving title from him can be affected in any manner by the covenant he entered into with the plaintiffs. The covenant is not one that, under the circumstances, can run with the land; and if, for want of privity between the parties, it originally imposed no burden upon the land, and failed to affect the title of Beers, the making of the subsequent conveyances, down to the defendants, subject to it, could not operate to place any greater restraint on the defendants, or to change their status in that respect from that of Beers originally.

The cases cited to establish the right of the plaintiffs to the relief prayed appear to be those in which the title of the various owners was derived from a common grantor, and where the covenants were mutual (*Tallmadge* agt. *East River Bank*, 2 *Duer*, 614; 26 *N. Y.*, 105; *Perkins* agt. *Codding*-



---

Trustees of Columbia College, N. Y., agt. Lynch.

---

ton, 4 Robt., 647); they differ in these important elements from the present case.

It cannot fail to be seen that, notwithstanding the agreement between Beers and the plaintiffs, the latter may be in a position to carry on any kind of business upon their adjacent land without any restraint being imposed upon them by the terms of this covenant, and which, if it has any force, may affect the defendants with great stringency.

A restriction as to the carrying on of any trade, or of any noxious or offensive business, has some known and well-defined lines and boundaries; but a restriction against the permitting or carrying on of any business whatsoever, considering the very extended meaning and application of that word "business," invades an area of interests and pursuits not easily estimated, and more or less affects the vital interests of the public. The word "business" is defined by Mr. Webster as "that which occupies the time, attention and labor of men, for the purpose of profit or improvement." It would be an unwise policy to exclude, from any part of a large city, the elevating and beneficent influences springing from literary, scientific, professional and artistic employments and pursuits, and tend to reduce its occupants to a condition of chronic somnolency or imbecility; and yet the terms of this covenant might be invoked to sustain such a claim.

The covenant sought to be enforced by the plaintiffs is liable to be made very objectionable. It is liable to conflict with the public welfare, and retard the advancement, morally, socially and pecuniarily, of the community. It is urged by the plaintiffs that in a free country one ought not to be arbitrarily restrained from doing as he pleases with his own property, and, if he pleases, subjecting that property to restrictions. Still, this has its limits, and the ancient obligation, "*sic utere tuo ut alienum non laedas*," cannot be wholly disregarded. It is to be observed that the plaintiffs, while they are at liberty to convey their own property, subject to restrictions and conditions, are by this suit seeking to

---

Trustees of Columbia College, N. Y., agt. Lynch.

---

enforce restrictions upon the property of other parties not deriving title from them, and which restrictions were made by other parties than the plaintiffs. The difference is very great where the granted premises are affected by a condition in favor of the grantor, or where two adjoining owners make an agreement; since, in the former case, independent of the conveyance, neither estate nor burden of covenant would have reached the grantee, and he is in no condition to complain.

From such consideration as I have given the case, I have come to the conclusion that it is not one where the court should grant the equitable relief sought, and that the complaint should be dismissed, with costs.

---

Smith agt. Mayor, &c., of the City of N. Y.

---

## SUPREME COURT.

ADDISON P. SMITH, respondent, agt. THE MAYOR, ALDERMEN  
AND COMMONALTY OF THE CITY OF NEW YORK, appellant.

*Salaries of city officers — authority for payment.*

The power to do a specific act, conferred by the legislature, is exhausted when that act is performed.

- A reference in an act of the legislature to a fact, does not render valid the authority under which that fact had come into existence. The authority to increase the pay of an official cannot be established by implication of law; it must be by direct and positive enactment.

The fact that an appropriation of money, made by the legislature for the payment of the salaries of certain officials, is sufficiently large to cover the sum claimed by one of them, is no authority for its payment.

*General Term, First Department, March, 1874.*

APPEAL from judgment recovered on trial before the court.

*John H. Strahan*, for appellant.

*Elbridge T. Gerry*, for respondent.

DANIELS, J.—The judgment appealed from was recovered by the plaintiff, as the assignee of James E. Coulter, one of the police justices of the city of New York, whose official term commenced on the 1st day of January, 1870, and it was rendered for the amount unpaid the assignor, at the yearly salary of \$10,000, for the year ending on the 1st of September, 1872. The recovery was resisted by the defendant on the sole ground that the assignor was by law restricted to the salary of \$5,000; and whether he was or not is the sole point required to be considered upon the present appeal.



---

Smith agt. Mayor, &c., of the City of N. Y.

---

In 1860 certain additional duties were imposed upon the police justices of the city of New York, and for that reason it was then enacted that, "for the additional duties imposed," "the common council or board of supervisors in said city and county" might increase the compensation of those officers (*Laws of 1860, p. 1014, § 26*). Under this authority the common council of the city advanced the police justices' salary to the sum of \$5,000 in the year 1862.

This authority, by the terms of the act, was conferred to meet what was deemed to be a particular exigency, requiring the performance of but one single act. The object was to render the salary adequate, as a compensation, for the services required to perform the increased duties assigned to the officer by the provisions of that statute. Those duties were at once apparent from the terms contained in the law, and it required but one act to adjust the compensation reasonably due for their performance. By that act it was contemplated that the compensation would be rendered reasonably sufficient, and, when it was performed, it was undoubtedly supposed by the common council that entire justice had been done in that respect. The object to be accomplished required it should be performed at once—not that partial justice in this respect should be done at one time and the performance of the full duty completed at another. It was not an authority to increase the compensation from time to time, but to adjust it in such a manner as would render it consonant to the changes then made by the law; and duty to the officer, as well as the plain intent of the law, contemplated but one increase for that purpose. These are matters which have been ordinarily maintained under the authority of the legislature, and no reason exists for supposing that such a change in the system was designed as would follow a complete relinquishment of that authority. The fair import of the act, as well as the purpose designed to be effected by this provision, are opposed to so broad a construction of its terms. In this respect it was similar to the authority conferred upon the commissioners

---

Smith agt. Mayor, &c., of the City of N. Y.

---

to make an assessment, in the case of *Williams agt. Haines* (49 *N. Y.*, 587), which was held to be exhausted when that act was performed, although it proved to have been illegally done. *Id.* (592, 593), and the case of *People agt. Woodruff* (32 *N. Y.*, 353) maintains the same construction. By advancing the salary to the sum of \$5,000 the authority created by the statute was exhausted, and both the common council and the board of supervisors were, from that time, powerless for further action in the premises.

After that authority had been exhausted by its appropriate exercise, and in May, 1869, the common council was prohibited from increasing the salaries of persons then in office, or their successors, except as provided by acts passed by the legislature (*Vol. 2, Laws of 1869*, 2133, § 11).

But, notwithstanding the fact that the authority given by the act of 1860 had been exhausted by the application and use of it, and the prohibition to the contrary contained in the act of May, 1869, the common council did, in December of that year, provide, by resolution, that the police justices' salary should be still further advanced to the rate paid to the city judge, which was \$10,000 per year. This seems to have been a plain, unwarrantable usurpation of power, and the act, for that reason, was utterly void.

In April, 1870, it was enacted that the mayor and comptroller were authorized to fix the salaries of the civil justices of the city at an amount not exceeding the salary then paid to the police justices (*Laws of 1870*, vol. 1, p. 888), and from that circumstance this unauthorized increase in the salary of the police justices is claimed to have been from that time legalized. The argument, though plausible, is not deemed to be sound. The law of 1870 dealt simply with the fact, not with the authority under which it had come into existence. No attention was devoted to the latter circumstance, neither was the amount paid mentioned or defined; but whatever that might be, whether authorized or not, that was to constitute the limit on the authority to be exercised under its provisions.

---

Smith agt. Mayor, &c., of the City of N. Y.

---

Upon so grave a matter as the unlawful assumption of official authority, the practice of the legislature is to use plain words when a design exists to ratify or confirm it. The object of this enactment was to confer authority on two of the corporate officers of the city to adjust the salaries of its civil justices; and, according to the terms made use of, that was the only object entertained. To confirm the unauthorized act of the common council of the preceding year required something beyond that; at least some terms indicating the existence of such a purpose. This act contains nothing from which that can be supposed to be within its spirit or design, and for that reason, under well-settled rules of construction, it cannot be comprehended by the law.

Courts are required to construe statutes, where no different intention is manifested, by their terms or the subject-matter to which they relate, according to the ordinary and popular meaning of the language in which they are made; and what cannot fairly be maintained to be within the signification of those terms is not to be deemed to be within the statutes. These laws are made for the public, and are required to be obeyed by its members, and no other rule is consistent with the substantial performance of the duties required to be observed under their provisions (*Newell agt. People*, 3 *Seld.*, 9, 97, 98; *People agt. Utica Ins. Co.*, 15 *John.*, 358, 380).

Under such a principle of construction no well-supported reason can be found for the conclusion that it was designed, by referring in this act to the fact of payment, to sanction and approve the authority on which the payment itself was made. Upon this subject the comments of judge DAVIES, in the decision of *The People agt. Woodruff* (*supra*), are peculiarly wise and appropriate. He there said that "it is a dangerous principle to imply power when it is not conferred by legislative authority in clear and distinct terms. It is always competent for the legislature to speak clearly and without equivocation, and it is safer for the judicial department to follow the plain intent and obvious meaning of an act, rather



---

Smith agt. Mayor, &c., of the City of N. Y.

---

than to speculate upon what might have been the views of the legislature in the emergency which may have arisen. It is wiser and safer to leave the legislative department to supply a supposed or actual *casus omissus* than attempt to do it by judicial construction" (31 *N. Y.*, 364).

Another objection to the construction of this statute, relied upon in behalf of the plaintiff, arises out of the circumstance that the confirmation of the act of the common council, in advancing the salary in 1869, was an object of a local legislative nature, and, as such, commonly, if not necessarily, made the subject of special legislative enactment. Certainly, such acts are not usually intended to be confirmed, when no expressions indicating the existence of such a design have been allowed to find their way into the law. Something more than a simple reference to the fact, unlawfully brought into existence, should be required to produce such a confirmation. If more than that be not required, then legislation is beset with risks which, in this rapid age, must often be productive of injurious consequences both to public and private interests. When such latitude of construction is adopted as requires its support from conjecture and speculation, rather than the import of the terms employed in the law, their administration will be rendered too uncertain to be consistent with the stability of substantial rights. The guide which safety as well as reasonable uniformity requires to be followed, is that which has been already mentioned, of construing the laws by the ordinary signification of the terms made use of, without so far refining upon them as to exceed their meaning in order to supply the necessities of some particular case.

The subject is not free from difficulty, as was well remarked by the learned judge before whom the trial was had. But the support supplied by the reference, made in the act of 1869 to the fact of payment, is altogether too shadowy in its nature to maintain the legality of the plaintiff's demand.

The additional circumstance, that the legislature in 1870 made the appropriation large enough to include the increase

---

Smith agt. Mayor, &c., of the City of N. Y.

---

of 1869, in no way improves the plaintiff's case. The same objections exist to the inference that by doing so the legislature intended to confirm the illegal act of the common council, as have already been mentioned in considering the other provision of the statute. If the appropriation had in terms provided that the police justices should be paid the salary of \$10,000, the case would be manifestly different from what it now is—an appropriation of a gross sum to pay salaries. The import of such an appropriation is that the officers who are to be paid out of it are to receive what they have a lawful right to demand and nothing beyond that. If the appropriation exceeds the sum necessary for that purpose, it does not follow that the officers intended to be paid out of it are entitled to have the excess divided between them.

The judgment should be reversed and a new trial ordered, with costs to abide the event, unless the plaintiff consent within twenty days to reduce the recovery to the amount due at the rate of \$5,000 per year, and the allowance made in the same proportion. And in case such consent be given, then the judgment as so modified should be affirmed without costs of the appeal.

DAVIS, P. J., concurred.

---

Wheeler agt. McCabe.

---

## N. Y. COMMON PLEAS.

LUCIEN T. WHEELER *et al.* agt. PATRICK MCCABE *et al.**Appeal dismissed — action on undertaking.*

Where an appeal from a judgment rendered by a single judge of the marine court to the general term is taken by the defendant upon an undertaking staying proceedings under sections 334 and 335 of the Code, and the appeal, through the defects or laches of the defendant in serving the printed case and exceptions, is dismissed by the general term, it is an effectual dismissal within the terms of the undertaking, and the sureties become liable; although it does not operate as a bar to another appeal, if the time limited therefor has not elapsed.

Ten days' notice before suit brought upon the undertaking, required by section 348 of the Code, of "the entry of the order or judgment affirming the judgment appealed from," does not apply to such a case, as the judgment was not affirmed, but the appeal was simply dismissed.

*General Term, June 1, 1874.*

THIS is an appeal from a judgment recovered in the marine court against the defendants, upon an undertaking given on an appeal from a judgment rendered by a single judge against the defendant, McCabe, to the general term.

ROBINSON, J.—As required by the act of 1853, chapter 617, that appeal was taken in the same manner and with like effect as appeals to the general term of the supreme court from a single judge, and upon like security, as required by sections 334 and 335 of the Code (*Roberts agt. Donnell*, 31 N. Y., 446), and was, as in that case it was intended, to stay proceedings on execution. The undertaking was, among other things, "to the effect that if the judgment appealed from, or



---

Wheeler agt. McCabe.

---

any part thereof, be affirmed, or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if it be affirmed only in part, &c." The appeal so taken was dismissed with costs, for failure to serve the printed case and exceptions required by the 50th rule of the supreme court. This dismissal was ordered on the 28th of October, 1872, unless the appellant, within fifteen days from service of a copy of such order, should serve copies of the printed case and exceptions; in which case the argument was to be put over to the November general term. At that term it was ordered and adjudged that the appellant had not complied with the permission offered him, and leave to argue the appeal was denied him.

There can be no question but that this was an effectual dismissal of the appeal within the terms of the undertaking (*Peters agt. Grouse*, 15 *Abb.*, 263). While such dismissal of an appeal for defects or laches in the appellant's proceedings does not operate as a bar to another appeal, if the time limited therefor has not elapsed, it is a mode of procedure well known in our system of practice, and operates as a final disposition of the action taken and rights of the appellant on such appeal (*Sun Mutual Ins. Co. agt. Dwight*, 1 *Hill*, 50; *Bates agt. Voorhees*, 20 *N. Y.*, 525; *Genter agt. Fields*, 1 *Keyes*, 483; *Maltby agt. Green*, 1 *id.*, 548; *Harper agt. Doll*, 1 *Daly*, 498). Such dismissal occurred within the terms of the undertaking by operation of orders of the general term of the marine court.

A further objection to this recovery is raised for want of ten days' notice before suit brought upon such an undertaking, required by section 348 of the Code, of "the entry of the order or judgment affirming the judgment appealed from." Such provision does not operate in this case, as the judgment was not affirmed, but the appeal was simply dismissed. The right of further appeal still existed until thirty days after notice of the judgment or order to the adverse party have

---

Wheeler agt. McCabe.

---

elapsed (*Code*, § 331; *Fry* agt. *Bennett*, 16 *How.*, 402, *affirmed in court of appeals*, 26 *How.*, 599). Such rights growing out of affirmance of the judgment and dismissal of the appeal being so essentially different, no such notice was required in the present case before suit brought.

Judgment should be affirmed.

LARREMORE, J., concurs.

---

Richardson agt. Kropf.

---

## N. Y. COMMON PLEAS.

ENOS RICHARDSON agt. ADAM KROPF.

*Undertaking — liability of sureties, on reversal of general term judgment.*

A judgment of *reversal* by the court of appeals of a judgment of the general term of the court below, reversing a special term judgment appealed from, does not satisfy and discharge the obligations of the sureties on the undertaking given on the appeal from the special to the general term.

*General Term, June 1, 1874.*

ROBINSON, *J.*—This is an action against sureties on an undertaking given on an appeal from judgment of the superior court to the general term, wherein, after a recital of the intention of the defeated party “to appeal to the general term of said superior court,” the undertaking contained the obligations of the sureties prescribed by sections 334 and 335 of the Code. The judgment was reversed by the general term, but on appeal to the court of appeals such judgment of the general term was reversed and the original judgment affirmed, and such judgment of the court of appeals was, by order of the superior court, made the judgment of that court.

The only question raised on the argument, “Whether the judgment of reversal by the general term satisfied and discharged the obligations of the sureties on the undertaking, has been settled adversely to the present appellants by the court of appeals, in the cases of *Robinson* agt. *Plimpton* (1862, 25 N. Y., 484) and *Gardner* agt. *Barney* (1863, 24 *How.*, 467), affirmed in that court (See 25 *How.*, 599; 4 *Abb.*, N. S., 251). The appellants, however, claim that the



---

Richardson agt. Kropf.

---

undertaking only recited an intended appeal to the general term, and that such restricted recital necessarily intended a limitation to the result of an appeal to that tribunal. While it is undoubted that sureties may limit their obligation, and if such restricted liability is accepted without objection that it does not give the full security afforded by the undertaking in the form presented by the Code, none other can be enforced. The obligatory portion of this undertaking was, however, in the general form prescribed by the Code; and while the recital was precisely what the appellant intended, it was also descriptive of such an appeal as the law, in that state of the case, alone permitted. No other but such appeal was taken by the principal, and the erroneous judgment he succeeded in obtaining at the general term imposed upon the other party the necessity of resorting to the court of appeals for its correction; but being thus corrected, it stood as a judgment consequent upon that appeal and resulting therefrom. It is claimed that the cases in the court of appeals above cited have been in effect overruled by the subsequent case of *Wilkins* agt. *Earl* (46 N. Y., 358), and that it holds that the subsequent judgment entered upon the remittitur is the judgment of that court, and not of the court below in which it is entered.

I am unable to perceive any such result from that decision, or that any such point arose or was necessarily decided. It simply asserts the stringent power of that court over the court below, to require a strict compliance with its mandate, and the execution of its judgment by the court to which it is sent; but it in no way holds that when the court below has so ordered and adjudged, its judgment, because so entered by enforcement, becomes any the less its own final judgment upon the original appeal.

The judgment should be affirmed.

J. F. DALY, J., concurred.

---

Soher agt. Fargo.

---

SUPREME COURT.

ANDREW SOHER agt. JAS. C. FARGO, &C.

*Service of supplemental complaint — right not absolute.*

It is not proper to serve a *supplemental complaint*, without leave of the court.

*New York General Term, June, 1874.*

APPEAL from order denying motion to set aside a supplemental complaint served without first obtaining leave of the court.

*Hamilton Cole*, for appellant.

*E. L. Andrews*, for respondent.

BRADY, J.—The appellant was right in the attitude assumed by him that the right to serve a supplemental complaint was not absolute, and, therefore, one resting in the sound discretion of the court. The recent case of *Beach agt. Reynolds* (53 *N. Y. Rep.*, 1) has set at rest, it may be justly hoped, any further dispute upon the question which had been, prior to that decision, sufficiently established as a rule of practice. The respondent's counsel now concedes that the order made at special term should be reversed.

Ordered accordingly, with costs.

DAVIS, P. J., and DANIELS, J., concurred.

---

Hovey agt. Rubber Tip Pencil Company.

---

## SUPREME COURT.

SAMUEL D. HOVEY and another agt. RUBBER TIP PENCIL  
COMPANY and others.*Damages on dissolution of injunction — sureties not liable.*

Where damages are assessed on the dissolution of an injunction, judgment cannot be entered against the *sureties* on such assessment. They are not necessarily parties to that proceeding and the assessment may be made without notice to them.

*It seems*, that an action upon the undertaking is the only mode in which the sureties can be charged.

*At Chambers, July, 1874.*

THE plaintiffs originally obtained an injunction, which was, on motion, dissolved and the action subsequently discontinued.

The defendants then obtained an order of reference, to assess the damages sustained by them by reason of the injunction. The referee reported their damages at the sum of \$650, and, on motion, his report was confirmed with ten dollars costs. An order was then entered, confirming the report and directing judgment to be entered against the sureties for \$660, which was done.

The plaintiffs then moved to modify this order by striking out that part of the order which directed a judgment to be entered against the sureties—and also to vacate and set aside the judgment which had been entered against them.

*Ambrose Monell*, for the motion.



---

Hovey agt. Rubber Tip Pencil Company.

---

There is no power in the court to direct a judgment against the sureties on an undertaking given on obtaining an injunction, citing *Lockwood agt. Safford* (1 *Georgia R.*, 72); *Higgins agt. Allen* (6 *How. Pr. R.*, 30); *Griffin agt. Slate* (5 *How. Pr. R.*, 205); *Bein agt. Heath* (12 *How. U. S. R.*, 168); *Wilde agt. Joel* (15 *How. Pr. R.*, 320); *Fitzpatrick agt. Flagg* (12 *Abb. Pr. R.*, 189); *Wait's Practice*, vol. 2, p. 125; *Patterson agt. Blonner* (6 *Abb. Pr. [N. S.]*, 446); *S. C.* (7 *Abb. Pr. [N. S.]*, 376, and 9 *Abb. Pr. [N. S.]*, 27); *Leavitt agt. Dabney* (40 *How. Pr. R.*, 277).

The sureties are not before the court, except to the extent to which they have assented, *i. e.*, to the method of *ascertaining not recovering* the damages. The statute cannot be stretched. No such rule existed *before* the Code, and it is certain that no express provision is contained in it to justify such a proceeding.

*John S. Washburn*, opposed.

The reference takes the place of an action on the undertaking and is fully justified by authority (*Russell agt. Elliot*, 2 *Cal. R.*, 215; *Willet agt. Scoville*, 4 *Abb. Pr. R.*, 405; *Hoffman's Provisional Remedies*, 322).

LAWRENCE, *J.*—An examination of the authorities cited on the motion to strike out the last paragraph of the order, entered herein July 9, 1874, which directs the entry of judgment against Cogswell and Friedlander, the sureties on the undertaking given at the time the injunction was granted, has convinced me that the portion of the order referred to was erroneous, and that that portion of said order should be stricken out and the judgment entered thereon vacated.

The precise point involved here was presented in the court of common pleas, in the very recent case of *Troxell agt. Haynes*. DALY, C. J., delivering the opinion at special term, in that case, says: "There was no authority to enter

---

Hovey agt. Rubber Tip Pencil Company.

---

up judgment upon the referee's report of the damages which the defendants have sustained by reason of the injunction; nor, when the referee's report is confirmed, is there anything in the 222d section of the Code *authorizing the entry of a judgment for the amount against the sureties.* \* \* \*

"The sureties are not necessarily parties to that proceeding, and the assessment may be made without notice to them (*Methodist Churches agt. Barker*, 18 N. Y., 465); and, where the report is confirmed, it is conclusive upon them as to the *extent* of the damages, but there is, for all I know, no way in which beyond this the sureties can be charged, *except by an action upon the undertaking.*"

This case seems to me to be directly in point. The general term of the common pleas, on appeal, while reversing the order appealed from, on another ground, adopted the views of the chief judge on this point.

I am of the opinion, therefore, that the portion of the order referred to was erroneous, and I direct it to be stricken out and that the judgment entered thereon be vacated.

Motions granted.

---

Rawson agt. Holland.

---

### N. Y. COMMON PLEAS.

SILAS RAWSON, EDWARD B. BULKLEY and WILLIAM L. RAWSON, appellants, agt. ALEXANDER HOLLAND, as Treasurer of the American Express Company, respondents.

*Common carriers — their liabilities — connecting lines.*

Where the buyer orders goods purchased to be sent by a particular mode of conveyance, and they are delivered to the carriers specified by him, the delivery on the part of the vendor is complete, and the title to the goods passes by the delivery from the consignor to the consignee.

But where the shipment of the goods by the consignor is not made according to the directions of the buyer, the title remains in the consignor. And if the goods are deposited at the end of the carrier's route, notice thereof should be given to the consignor and not the consignee, where the carrier refuses to deliver them to the connecting line, which is to take them to their destination, on the ground that the liabilities of the latter are greater in extent than the exemption contained in the original contract of shipment.

Where the goods are destroyed by fire while on deposit, without the proper notice given to the consignor or owner of the refusal to deliver them to the connecting carrier, the carrier who received them is liable to the owner or consignor for the loss.

Especially is this the case where the carrier had known for several years the regulation established by the connecting line, and the carrier had been required to change its forms in consequence of it.

*General Term, March, 1874.*

*Present*—Hon. CHARLES P. DALY, C. J., H. W. ROBINSON and R. L. LARREMORE, JJ.

IN March, 1866, the appellants, merchants in New York, sold to Messrs. Day & Lathrop, of Dryden, Mich., a bill of goods of the value of \$320.35. The buyers ordered the goods



---

Rawson agt. Holland.

---

sent by the Grand Trunk Railway, but the plaintiffs sent them by the defendant, marked Day & Lathrop, Dryden, Mich., via. Ridgway. Ridgway was a station beyond Detroit, on the Grand Trunk Railway. This railway was a common carrier of goods for hire. The defendant carried the goods to Detroit, where they arrived on or before April 6, 1866; then, without delivering them or offering to deliver them, or giving notice to the next carrier, stored them and wrote to Day & Lathrop that the goods were at Detroit and kept them for fifteen days, when they were destroyed by fire. The appellants sued Day & Lathrop for the price of the goods and Day & L. defeated them, because the goods were not sent according to directions.

This cause was tried before chief justice SHEA, without a jury, and he gave judgment against the appellants.

*D. M. Porter*, counsel for plaintiffs, appellants.

I. The appellants, having sent the goods by the defendant, contrary to the orders of the purchasers, are the owners of the claim or demand sued for, as the goods still remained the plaintiffs' property (*Hills* agt. *Lynch*, 3 *Robertson*, 42; *Hicks* agt. *Cleveland*, 48 *New York*, 84).

This prevented performance of the contract of purchase and was a rescission (*Dubois* agt. *Delaware and Hudson Canal Co.*, 4 *Wend.*, 290; 2 *Parsons on Contracts*, 5th ed., page 675; *Hague* agt. *Porter*, 3 *Hill*, 141). The contract of purchase was an executory contract (*Kelly* agt. *Upton*, 5 *Duer*, 336). An action for the loss is maintainable by the appellants alone (2 *Greenleaf Ev.*, § 212; *Coats* agt. *Chaplin*, 3 *Ad. & El.*, 483 [*N. S.*]). The court so found.

These facts take the case out of the rule laid down in *Terry* agt. *Wheeler*, cited by respondent.

II. The Grand Trunk Railway was an intermediate carrier between Detroit and Dryden, via Ridgway, and "when goods are shipped and must pass through the hands of several

---

Rawson agt. Holland.

---

intermediate carriers before arriving at their place of destination, the duty of each intermediate carrier is to transport the goods safely to the end of his route, and deliver them to the next carrier on the route beyond." "An intermediate carrier in such case does not relieve himself from liability by simply unloading the goods at the end of his route and storing them in his warehouse *without delivery or notice to, or any attempt to deliver to the next carrier*" (*McDonald* agt. *Western Railroad Co.*, 34 *N. Y.*, 497; *Lawrence* agt. *Winona and St. Peters R. R. Co.*, 15 *Minnesota*, 390; *Northrop* agt. *Syracuse, &c., R. R. Co.*, 5 *Abb. [N. S.]*, 425.) The respondent did what is here declared illegal. The case of *Mills* agt. *Mich. C. R. R. Co.* (45 *N. Y.*, 622) is an authority on this point, as the usual notice was given, in the usual way, to the next carrier, although decided against the shippers on that ground, because the carrier had done its duty.

III. The Grand Trunk Railroad Company was a common carrier, as it carried for all upon the same terms. No bill of lading or contract had to be signed by any party, but the property and advice note or bill of lading was delivered by the Grand Trunk Railroad Company to the party delivering the goods; and by reference to the terms it will be seen the defendant and court have misinterpreted the effect of the delivery of the goods by the defendant upon the bill of lading (*which would not have bound the defendant in the least*), but also as to the effect of the terms stated in the bill of lading of the Grand Trunk road, even if operative, as they do not and could not make the defendant an insurer, nor in any wise liable.

IV. The delivery of the goods to the defendant to be carried beyond its line, authorized the defendant to deliver it to the next carrier, upon the usual terms required by such next carrier, especially as the contract had not to be signed (*Moriarty et al.* agt. *Harnden's Ex.*, 1 *Daly*, 227).

Inasmuch as the defendant was required to deliver the goods to the next carrier and procure them carried to their

---

Rawson agt. Holland.

---

destination (*McDonald* agt. *Western R. R.*, *supra*), the defendant was authorized to make the necessary delivery, upon the usual terms, as when an agent is employed to do an act he is clothed with the authority to perform the act.

The consignee is under no obligation to give any new directions, nor to call for the goods (*Whitbeck* agt. *Holland*, 45 *N. Y.*, 13). An express company is a common carrier (*Whitbeck* agt. *Holland*, *supra*; *Read* agt. *Spaulding*, 5 *Bosworth*, 395; *Belger* agt. *Dinsmore*, 34 *How.*, 421, and *authorities there cited*).

V. The carrier must not be in default; the loss must not be occasioned by its misconduct, omission, neglect or ignorance of its own duties (*Read* agt. *Spaulding*, *supra*; *S. C.*, 30 *N. Y.*, 630; *Michaels* agt. *New York Central R. R. Co.*, 30 *N. Y.*, 564).

VI. The objections were improperly overruled, and the judgment should be reversed, with costs.

*Beardslee & Cole*, counsel for defendants, respondents.

I. A common carrier, by the mere receipt of a package marked for a point beyond his route, only takes upon himself the responsibility of carrying the same as far as his route extends, and then delivering it according to his established usage. Any liability beyond a carrier's established route, can only be imposed by special contract (*Redfield on Railways*, vol 2, p. 114, and notes; *Farmers' and Mechanics' Bank* agt. *Champ. Trans. Co.*; 16 *Vermont*, 52; *Hempstead* agt. *N. Y. Cen. R. R.*, 28 *Barb.*, 485; *Van Santvoord* agt. *St. John*, 6 *Hill*, 158; *Jenneson* agt. *Camd. and Amb. Railway*, 4 *Am. Law Reg.*, 234).

In this last case all the cases are reviewed, and the conclusion is reached that in this country the rule is, that when goods are delivered to a carrier marked for a particular place, but unaccompanied by any other directions for their transportation except such as might be inferred from the marks them-



---

Rawson agt. Holland.

---

selves, the carrier is only bound to transport and deliver them according to the established usage of his business, *whether that usage were known to the other party or not.*

II. It is proved in this case that the defendant's route ran only to Detroit, and that it was their invariable custom, when goods arrived there marked for Dryden *via* Ridgway, to hold same and notify consignee.

In the absence of any proof, and there is none in the case, the plaintiffs must be presumed to have contracted in accordance with the established custom of defendants (*Nelson agt. Hudson R. R. Co.*, 48 *N. Y.*, 498, and cases cited, *supra*).

III. The means of communication between Detroit and Dryden in April, 1866, were by teams and the Grand Trunk Railway. That road refused to receive freight unless a contract was made substantially exempting them from liability. The terms of the contract will be found in the case.

The court found that this contract would have in fact made the defendants insurers of the property after it had gone from their possession.

IV. The court finds that no contract was required to be actually signed by defendants. The case shows that defendants were obliged to sign a request addressed to the Grand Trunk Railway, that they would receive goods subject to certain terms and conditions. It further appears that defendants were cognizant of the terms of their bill of lading, and therefore would by a mere acceptance have been bound by its terms.

V. A common carrier becomes an insurer of goods, if without authority he causes them to be forwarded by a route or means of conveyance of his own choosing (*Ackley agt. Kellogg*, 8 *Cow.*, 223).

VI. Even if a carrier be bound to forward if the connecting carrier refuses to receive, the first carrier may terminate his liability by storing the goods, even without notice to the owner (*Johnson agt. N. Y. Cen. R. R. Co.*, 33 *N. Y.*, 610 ;

---

Rawson agt. Holland.

---

*Forsyth* agt. *Walker*, 9 *Barr*, 148; *Goold* agt. *Chapin*, 20 *N. Y.*, 259; *Fisk* agt. *Newton*, 1 *Denio*, 451).

Here the Grand Trunk Railway refused to receive the goods in question as common carriers. It was unnecessary to offer these particular goods to them, as they refused to receive *any goods* except on their forms.

VII. The defendants were bound to treat this particular shipment, in the absence of specific instructions, exactly the same as they did others of like character, and in case of any deviation and loss resulting they would have been liable.

VIII. Even if it be held that the first carrier, when he arrives at the end of his route, is bound to deliver to the connecting carrier, he cannot be called upon to make any extraordinary and unusual contract, continuing his liability after the goods have gone from his control.

He has no authority to make such a contract and bind the parties in interest (*Lamb* agt. *Cam. and Amb. R. R. Co.*, 46 *N. Y.*, 271).

The case of *Nelson* agt. *Hud. R. R. Co.* (48 *N. Y.*, 498) only goes so far as to hold that, where a consignor is directed to ship goods by a particular carrier, the authority is conferred upon him to make any contract that particular carrier requires. The present case does not fall under this ruling.

Here the chance was given to the consignees to control the manner of forwarding. They were notified of the facts of the case and asked to take upon themselves the responsibility of selecting a carrier. They declined to do so, and the plaintiffs now seek to visit upon defendants the consequences of this neglect and refusal of the consignees.

IX. The consignees are the presumptive owners of goods, and in this case were the proper persons to whom to give notice (*Fitz Hugh* agt. *Wiman*, 5 *Selden*, 559; *Sweet* agt. *Barney*, 23 *N. Y.*, 335).

X. Even if we admit that the consignees in this case were not the real owners of the goods, still they were the agents

---

Rawson agt. Holland.

---

of the consignors, and entitled to control the manner of delivery (*Sweet agt. Barney*, 23 *N. Y.*, 335).

XI. The only right remaining in the consignor, after delivery to the carrier, is that of stoppage *in transitu*. Hence in this case, the consignees, being the owners of the goods so far as the defendants were concerned, notice given to the consignees was all that could be done by the carrier. He would be bound to disregard any instructions given by the consignors.

Upon refusal of consignee to receive the goods, the carrier might be bound to observe the directions of the consignor, if he received any. Even then he would not be bound to give notice to the consignor (*Williams agt. Holland*, 22 *How. Pr.*, 137).

XII. The defendants did all that reasonably could be asked in the premises.

Upon the arrival of the package at Detroit they notified the consignees, stated the facts of the case and asked for authority and instructions. They could not be called upon to take upon themselves any extraordinary responsibility. The choice of a carrier lay with the consignees. They refused to choose one. The loss resulted directly from the fire, and indirectly from the fault or negligence of the consignees themselves. The consignors and consignees are agents, one for the other, and the contract or negligence of one affects equally the other (*Nelson agt. Hud. R. R. Co.*, 48 *N. Y.*, 498).

Even admitting that in law the defendants might have made the contract required by the Grand Trunk Railway without incurring responsibility, still it is submitted upon principle that they had a right to require the consignees to make their choice and so avoid any possible responsibility on their own part after the goods had gone from under their control.

It is a well settled-rule that, where a merchant sends for instructions, if the correspondent does not at once reply he



---

Rawson agt. Holland.

---

cannot complain of any act relative to the subject-matter done fairly and in exercise of a just discretion by the merchant. The same rule is upon principle applicable here.

XIII. The judgment should be sustained upon the grounds advanced by the court.

The judgment is clearly sustainable upon other grounds, and should be affirmed, even though this court should deem the position taken by the court below untenable; for there was a special contract in this case, and that contract is evidenced by the bill of lading, exhibit C.

XIV. The right of a carrier to limit by special contract his common-law liability is no longer an open question.

XV. The bill of lading in evidence constitutes the contract between the parties relating to the carriage of the goods in question (*Wolf* agt. *Myers*, 3 *Sand.*; *Dow* agt. *N. J. Steam Nav. Co.*, 1 *Kernan*, 485; *Magee* agt. *Camden and Amboy R. R. Co.*, 4 *Albany Law Journal*, 113; *Grace* agt. *Adams Express Co.*, 100 *Mass.*, 105; *Guillaume* agt. *Ham. and Am. P. Co.*, 42 *N. Y.*, 212; *Steinway* agt. *Erie R. R. Co.*, 4 *Hand*, 123; *Pendergast* agt. *Adams Ex. Co.*, 101 *Mass.*, 120; *Belger* agt. *Dinsmore*, court of appeals, unreported, decision handed to the court).

There is no evidence whatever in this case, that the plaintiffs were ignorant of the terms and conditions of the bill of lading.

XVI. The bill of lading having been put in evidence by the plaintiffs they are bound by its terms (*Wetzell* agt. *Dinsmore*, common pleas, general term, 1871).

XVII. Under this bill of lading, the duty of defendants was simply to forward to Detroit and notify the consignees. There was no agreement to forward, and no such agreement can be added by application to a positive contract.

XVIII. The plaintiffs' own testimony shows that the title to the goods in question had passed to the consignees before delivery to defendants. The title passed when the goods were approved by the vendee and were separated from the

---

Rawson agt. Holland.

---

rest of the goods in the store. The direction to forward was something not connected with the contract of sale (*Wheeler agt. Terry*, 25 *N. Y.*, 520; *Olyphant agt. Baker*, 5 *Denio*, 379).

DALY, C. J.—I think the error in this case was the assumption, by the judge who tried the cause, that if the defendants had delivered the goods to the Grand Trunk Railway company, the connecting carrier, receiving from that company a bill of lading in their usual form, exempting them from liability in the event of injury to or the loss or destruction of the property by specified causes, that the defendants would have taken upon themselves the responsibility of insurers if the goods were lost or injured whilst in the custody of the Grand Trunk Railway company, by any of the causes for which that company declared in their receipt or bill of lading that they would not be responsible.

When a carrier is instructed by the consignor to send the goods beyond his own route by a route or carrier named by the consignor, and the carrier, instead of doing so, sends them by another route, and the goods are lost, he is answerable (*Ackley agt. Kellogg*, 8 *Cow.*, 225; *Jackson agt. The N. Y. Central R. R. Co.*, 33 *N. Y.*, 610); but it by no means follows that a carrier incurs a like responsibility when his own carriage is completed by delivering the goods to the connecting carrier for further transportation, because he receives a receipt or bill of lading from that carrier, and the goods are lost by causes for which that carrier declared in bill of lading he would not be responsible.

The judge has found that the Grand Trunk Railway company did not require, in the usual course of its business, any bill of lading to be signed by the defendants, nor any special contract to be made, and that no other contract was required to forward the box than such as would have resulted by the delivery of the box and contents, and by receiving a bill of lading of that railroad in terms the same as was required of

---

Rawson agt. Holland.

---

all others. This was a receipt or bill of lading declaring that the property was received to be sent by the company subject to the terms and condition stated upon the other side of the paper, which contained what was entitled "General notices and conditions of carriage," followed by a long list, nineteen in number, of stipulations of exemption from liability in the event of loss or injury, preceded by a general statement that it was understood and agreed that the company were not to be responsible in any of the cases thus specially excepted.

It was held in *Lamb agt. The Camden and Amboy R. R. & T. Co.* (46 N. Y., 271), that the carrier to whom goods are delivered to be carried to the end of his route and then forwarded by him by the usual connecting line of transportation, is not an agent of the owner with power to bind the owner by any stipulation in respect to the further carriage of the goods not embraced in his own contract. I understand both the judge who delivered the opinion of the court of appeals in that case, GROVER, J., and the judge who dissented, PECKHAM, J., to agree that this *is* the law, which is affirmatory of the view taken by this court when the case was before us, and of the authorities then cited in support of it (*Same Case*, 2 *Daly*, pp. 484, 485, 490 to 493). Assuming this, then, to be the law, the Grand Trunk Railway could not, if the defendants had delivered to them the box for carriage, have created a special contract, binding the plaintiffs by stipulation not embraced in the contract made by the plaintiffs with the defendants by simply delivering such a receipt as the one above stated. The receipt or bill of lading given by the defendants to the plaintiffs, which will be assumed to be the contract entered into by them with the plaintiffs, does contain exemption from liability, and such exemptions will be regarded as extending to all the connecting carriers who are assumed to have contracted for the further carrying of the goods upon the same conditions as the first carrier. But the Grand Trunk Railway forms of receipt contain many more



---

Rawson agt. Holland.

---

stipulations of exemptions from liability, and if the defendants had ever signed a special contract embracing these additional stipulations it would not have been binding upon the plaintiffs. Such I understand to be the view expressed by Mr. justice GROVER, who delivered the opinion concurred in by the majority of the court in *Lamb agt. The Camden R. R. & T. Co.* (see p. 277); and if the defendants, as carriers, had no power to enter into such a special contract for the plaintiffs, none could be created by the simple delivery to them of such a receipt. There was, then, no excuse for the defendants not delivering the goods to the Grand Trunk Railway, it being well settled that it is the duty of the carrier, when the goods are transported to the end of his route, to deliver them to the next connecting line or carriers, and that his liability as carrier continues until he has discharged that duty, or, where he cannot do so, has divested himself of his common-law liability by storing the goods and notifying the consignors, where, as in this case, he knows who the consignor is (*Mills agt. The Michigan C. R. R. Co.*, 45 N. Y., 622; *McDonald agt. Western R. R. Co.*, 34 id., 497; *Ladue agt. Griffens*, 25 id., 364; *Goold agt. Chapin*, 20 id., 259; *Williams agt. Holland*, 22 How. P. R., 137; *Northrup agt. The Syracuse R. R. Co.*, 5 Abb. P. [N. S.], 425; *Redfield on Carriers*, 222, § 302).

This box when received by the defendants in this city, was marked Day & Lathrop, Dryden, Michigan, and was acknowledged in the defendants' bill of lading to have been received from the plaintiffs so marked. The defendants' route extended only to Detroit, Michigan; Dryden was a point beyond that. From Detroit there were two modes of forwarding, by team or by railroad, to Ridgway, a station on the Grand Trunk Railway about forty miles from Detroit, Dryden being twenty-six miles from Ridgway. When the box arrived at Detroit, the defendants did not forward it, because the Grand Trunk Railway would not receive it except on their forms. No request was made to them to carry the

---

Rawson agt. Holland.

---

box, nor did the defendants forward it by team. They placed it in the warehouse of the Great Western Railway, and sent a letter to the consignees at Dryden, asking them to sign the form of the Grand Trunk Railway, inclosing one of the forms in the letter, with a further request that the consignees would give them an order to sign for them for future lots, releasing them after they (the goods) were out of their possession, and to prevent future delays. They also stated in the letter that they only contracted to carry goods to Detroit, and that the Grand Trunk Railway forms made them responsible, after the goods were out of their possession.

The consignees did not sign the forms sent to them, nor reply to the letter from the defendants; but on receiving it, they sent a letter to a Mr. Smith, the agent of the Grand Trunk Railway at Ridgway, inclosing an order for the goods, which they did for the reason that Ridgway was the usual and most convenient point for them for receiving the goods, and they supposed that Smith, the agent there, would, on receiving their letter, "send and get the goods up to his station," so that they could get them with their team. In this way the box was delayed at Detroit, and fifteen days after the defendants sent the letter to the consignees, the goods were consumed in the destruction by fire of the warehouse of the Great Western Railway.

When the defendants received the box from the plaintiffs for carriage, they knew of the regulation established by the Grand Trunk Railway, for they had to change their forms in consequence of it, and the regulation had existed for eight years. If they were unwilling, without special instruction, to deliver the box to the Grand Trunk Railway under the apprehension of personal responsibility beyond their route, they should have asked for such instruction when they received the box; for even where the circumstances are such as to warrant the presumption on the part of the carrier that the consignee is the owner of the goods, the consignor, where he is, as is the case here, known to the carrier, is to be treated

---

Rawson agt. Holland.

---

as the agent of the consignee for the purpose of shipping and consigning the goods (*Nelson agt. The Hudson River R. Co.*, 48 *N. Y. R.*, 507; *Loudon, &c., Rugg agt. Bartlett*, 7 *H. & N.*, 400; *York Co. agt. Central R. R. Co.*, 3 *Wall.*, 107; *Squire agt. N. Y. Central R. R. Co.*, 98 *Mass.*, 239). If, therefore, the defendants would not forward the goods by the Grand Trunk Railway, which was the connecting railroad line, without special instruction, they should have so advised the consignor, he having authority to make the contract in respect to their transportation, and any contract he had entered into would have been binding upon the consignees (*York Co. agt. Central R. R.*, *supra*). This, according to the recent cases, is the rule where the consignor is not the owner, the property in the goods having entirely passed from him and vested in the consignee by the delivery to the carrier; but in this case the consignors were the owners. Day & Lathrop purchased the goods from the plaintiffs and instructed them to forward them by the Grand Trunk Railway. The plaintiffs delivered them to the defendants without any such instruction, and having brought an action against Day & Lathrop for the price of the goods, the plaintiffs were defeated because they did not ship the goods as Day & Lathrop had directed them to do. Day was examined as a witness upon the present trial, and testified that if the plaintiffs had obeyed his instructions, the goods would have gone through the Grand Trunk Railway to Ridgway without going to Detroit, and escaped the accident which caused the destruction.

Where the buyer orders the goods purchased to be sent by a particular mode of conveyance, and they are delivered to the carriers specified by him, the delivery on the part of the vendor is complete, and the title to the goods passes by the delivery from the consignor to the consignee. But that was not this case, and the plaintiffs, both at the time of the shipment, and when the goods were destroyed, were the owners. If the goods were not to be forwarded by the connecting railroad at Detroit without special instructions, the plaintiffs



---

Rawson agt. Holland.

---

were the persons to be advised of it, when they shipped the goods, and the defendants, in my judgment, did not divest themselves of their responsibility as carriers by placing the goods in the warehouse of the railroad depot at Detroit, and notifying the consignees by letter, who were sixty miles from Detroit, that the goods would be sent to them by the Grand Trunk Railway, if they would sign a form releasing that railroad from liabilities to a greater extent than the exemption contained in the original contract of shipment. If the defendants desired to comply with the wishes of that company, or to avoid embarrassments with it, the simpler course and the more just one to all parties, would have been to have added to their own contract a stipulation authorizing them to forward by that line, subject to the terms and conditions of that company; so that a consignor, whether the owner of the goods or acting as the agent of the consignee in the shipment of them, might exercise the right of determining whether he would send them by the defendants, as carriers, subject to such conditions or not.

For these reasons I am of the opinion that the judgment should be reversed.

I concur in liability of defendants for breach of duty as forwarders.

H. W. R.

I think defendants were liable as forwarders and that judgment should be reversed.

R. L. L.

---

Bean agt. Bowen.

---

## SUPREME COURT.

EBEN BEAN and HENRY H. VARY, Executors of HENRY BOWEN, deceased, agt. WILLARD BOWEN and others.

*Implied trust to executors in will — declared void with the same clause which is void for illegal accumulation — invalid legacies — valid legacies.*

Although there is no *trust term* granted to the executors in a will, in words, such a term will necessarily be implied where the directions are to sell the real estate and convert all the testator's property into money, and to invest the proceeds for a term of years for the purpose of accumulation, and then to pay certain specified legacies, and thereafter to divide the residue, if any, to other legatees.

Such directions impose active duties upon the executors, *as trustees* of the estate; as much so as though the testator had, in terms, described them as such in the will. They necessarily took the legal title and the right to the possession of the property.

Even as to real estate, courts have implied an estate in the executors as trustees, although no estate was given them in words; and personal property is subject to trusts, as well as real estate.

The clause in the will, which implies this trust estate given to the executors, cannot be sustained. It is limited to five and ten years, and such a term is unauthorized.

The gifts of the legacies which are limited to take effect after a prescribed period of accumulation, and to be paid out of the accumulated fund as a part of the subject-matter of the gifts, being a period too remote, the gifts must fail. Legacies dependent upon a void trust fall with it.

A gift is too remote unless, according to the intention of the testator, some person must necessarily be in existence with legal power to dispose of the property within the period limited by the rules of law.

Gifts in another clause of the will being entirely separable from the void legacies and also from the trust scheme, may be sustained, for the statute against perpetuities only cuts off estates which are limited to take effect after the prescribed limit.

As the trust must be declared void for contravening the statute of perpetuities, the real estate of the testator will descend to his heirs-at-law, and the personal estate must be distributed to the next of kin.

---

Bean agt. Bowen.

---

*Special Term, Syracuse, April, 1874.*

ACTION by the executors to obtain the construction of the will of Henry Bowen, deceased.

The provisions of the will are as follows: By the first section the testator gave to his wife the use of all his property during her life, and so much of the principal as might be necessary for her support during her life.

By the second section he gave Minnie Gray \$100, payable in one year, and \$400, payable within five years after his death, with annual interest at six per cent, to commence one year after his death.

By the third section he gave the Baptist Theological Seminary, located at Rochester, \$2,000.

By the fourth section he gave the Crosier Theological Seminary, located at Upland, Pa., \$2,000.

By the fifth section he gave the Baptist Theological Seminary, at Chicago, \$2,000.

By the sixth section he directed that the three last mentioned legacies should be paid in the order in which they are named.

By the seventh and eighth sections he made specific bequests of books of the value of not exceeding \$200.

The ninth, tenth and eleventh sections of the will are in the words following, to wit:

"Ninth. I hereby direct my executors, as soon as convenient after my decease, and that of my wife, Arsinoe K. Bowen, to sell all my real and personal property, except United States bonds and stock in the Skaneateles Iron Works, and invest the proceeds for accumulation; and the whole amount, including the United States bonds and stock in the Skaneateles Iron Works, shall be held for accumulation for five years. At the expiration of said five years after my decease, said accumulation shall be converted into cash (except the stock in the Skaneateles Iron Works) and the bequests named in this instrument paid, so far as said accumulation shall provide for such payment. The stock in the Skaneateles Iron Works



---

Bean agt. Bowen.

---

shall be held five years longer. At the expiration of said period said stock and the accumulations thereof shall be converted into cash and the remaining portions of the legacies paid.

"Tenth. I hereby direct my executors, at the final settlement of my estate, provided there are funds sufficient, to give Minnie Gray an additional \$500, if, in their judgment, she shall have used the previous bequest in a careful and prudent manner.

"Eleventh. At the final settlement of my estate, all the bequests previously named having been paid, the balance of the estate, if any shall remain, shall be divided equally between the American Baptist Missionary Union, located at Boston, and the American Baptist Home Mission Society, located in New York, and the American Baptist Publication Society, located at Philadelphia."

The will bears date October 16, 1868; the testator died November 13, 1868; the will was admitted to probate on the 28th day of April, 1869.

The heirs and next of kin of the testator put in an answer to the complaint, claiming that the bequests and provisions contained in the *third, fourth, fifth, sixth, ninth, tenth and eleventh* sections of the will are illegal and void, and that they are entitled to the estate of the testator, both real and personal, except the sums bequeathed to Minnie Gray by the second section, and the books specifically bequeathed by the seventh and eighth sections.

It was proved that the testator's personal property was of the value of \$5,626.79, including his stock in the Skaneateles Iron Works, which was appraised at \$2,250; and that he died seized of real estate, situated at Skaneateles, of the value of \$3,000; the value of all his property being \$8,626.79.

*Benoni Lee*, for plaintiffs.

*H. L. Comstock*, for the heirs and next of kin.

---

Bean agt. Bowen.

---

I. The ninth section of the will is illegal and void.

1. It expressly directs the *accumulation of the income* of nearly the whole of the testator's property for the period of *five years*, and part of it for *ten years*,—not for the benefit of minors, but almost wholly for the benefit of corporations, in direct violation of an express prohibition of the statute (1 R. S., 773, §§ 1, 2, 3; *Dodge agt. Pond*, 23 N. Y., 69; *Harris agt. Clark*, 7 id., 242; *Gilman agt. Reddington*, 24 id., 9; *Kilpatrick agt. Johnson*, 15 id., 322).

2. The effect of this section is to work an *illegal suspension of the absolute ownership of the fund set apart for accumulation*.

(a) For the purpose of determining the validity of the will, the real estate must be treated as converted into personal property, pursuant to the power in trust contained in the ninth section (*Stag agt. Jackson*, 1. N. Y., 206; *Dodge agt. Pond*, 23 id., 69; *Chamberlain agt. Chamberlain*, 43 id., 424).

(b) The powers and duties of the executors are such as to constitute them trustees by *necessary legal implication* (*Vail agt. Vail*, 7 Barb., 226; *Craig agt. Craig*, 3 Barb. Ch., 76; *Bradley agt. Amidon*, 10 Paige, 235; *Phelps agt. Phelps*, 28 Barb., 121; *Vail agt. Vail*, 4 Paige, 328; *Brewster agt. Striker*, 2 N. Y., 19; *Striker agt. Mott*, 2 Paige, 388; *Graff agt. Bonnett*, 31 N. Y., 9; *Van Nostrand agt. Moore*, 52 id., 12; *Kane agt. Gott*, 24 Wend., 663; *Knox agt. Jones*, 47 N. Y., 396; *Adams agt. Perry*, 43 id., 497; *Blakely agt. Colden*, 15 id., 617).

(c) The interest of each of the legatees, whose bequest is directed to be paid out of the accumulated fund, is a *future or expectant interest*; and this is a further reason for implying a trust (1 R. S., 723, §§ 9, 10; *ibid.*, 773, §§ 1, 2; *Gott agt. Cook*, 7 Paige, 521; *Hone agt. Van Schaick*, *ibid.*, 231; *Arnold agt. Gilbert*, 3 Sand. Ch., 531; *Field agt. Field's Executors*, 4 id., 528; *Butler agt. Butler*, 1 Hoff., 244).

(d) It is provided by statute that "no person, beneficially

---

Bean agt. Bowen.

---

interested in a trust for the receipt of rents and profits of lands, can assign or in any manner dispose of such interest" (1 *R. S.*, 729, § 63).

(e) It is now abundantly settled that this provision of the statute applies to bequests of future interests in the income of personal property (*Gott agt. Cook*, 7 *Paige*, 521; *Hone agt. Van Schaick*, *ibid.*, 231; *Graff agt. Bonnett*, 31 *N. Y.*, 9; *Campbell agt. Foster*, 35 *id.*, 361; 1 *R. S.*, 773, §§ 1, 2).

(f) The absolute ownership of the fund set apart for accumulation is, therefore, suspended for *five years*, and part of it for *ten years* (*Hone agt. Van Schaick*, 7 *Paige*, 231; *Gott agt. Cook*, *ibid.*, 521; *Coster agt. Lorillard*, 14 *Wend.*, 262; *Dodge agt. Pond*, 23 *N. Y.*, 69; *Harris agt. Clark*, 7 *id.*, 242; *Amory agt. Lord*, 9 *id.*, 403; *Knox agt. Jones*, 47 *id.*, 389; *Field agt. Field's Executors*, 4 *Sand. Ch.*, 528).

(g) Such a suspension for a definite period, not measured by life, is illegal and void (*Dodge agt. Pond*, 23 *N. Y.*, 69; *Hawley agt. James*, 16 *Wend.*, 61; *Beekman agt. Bonsor*, 23 *N. Y.*, 315; *Boynton agt. Hoyt*, 1 *Denio*, 53; *Hone agt. Van Schaick*, 20 *Wend.*, 564; *Field agt. Field's Executors*, 4 *Sand. Ch.*, 528).

(h) It makes no difference that the bequests are for charitable uses (*Adams agt. Perry*, 43 *N. Y.*, 437; *Holmes agt. Mead*, 52 *id.*, 332; *Bascom agt. Albertson*, 34 *id.*, 584; *Yates agt. Yates*, 9 *Barb.*, 324).

II. The direction to sell the real estate is *a part of the illegal scheme for suspension and accumulation*, and must fall with it.

1. This direction created a *power in trust*, for the express purpose of having the proceeds of the sale accumulated with the personal property, and ultimately paid over to the legatees, as directed by the same clause which creates the power (*Kinner agt. Rogers*, 42 *N. Y.*, 531; *Russell agt. Russell*, 36 *id.*, 581; *Skinner agt. Quin*, 43 *id.*, 99; *Germond agt. Jones*, 2 *Hill*, 569).



---

Bean agt. Bowen.

---

2. It is impossible to separate this *trust power* from the *illegal trust scheme*, of which it forms a part.

3. As the trust scheme cannot be carried into effect, but fails, the trust power, designed as a part of the means of carrying out that scheme, must fall with it (*Hawley agt. James*, 5 *Paige*, 318; *Bogert agt. Hertell*, 4 *Hill*, 492; *Smith agt. Claxton*, 4 *Mad.*, 484; *Wright agt. Trustees of M. E. Church*, 1 *Hoff.*, 220; *Wood agt. Keyes*, 8 *Paige*, 365; *Ackroid agt. Smithson*, 1 *Bro. C. C.*, 502; *Crouse agt. Bailey*, 3 *P. Wms.*, 22, *Cox's note*; *Amphlet agt. Parks*, 2 *Russ. & M.*, 221; *Hawley agt. James*, 7 *Paige*, 219; *Wood agt. Cone*, *ibid.*, 471; *Thompson agt. Carmichael's Executors*, 1 *Sand. Ch.*, 397).

III. The real estate is not legally disposed of by the will, and it therefore descended to the testator's heirs-at-law.

1. The purpose of the direction to sell the land being *expressed*, and that purpose being *illegal*, and failing for that reason, there is *no equitable conversion* (*See cases last above cited*).

2. There is no devise of the land as such.

(a) The testator did not intend to dispose of the real estate, as such, by the eleventh section of the will.

(b) The language of the eleventh section is not sufficient to effect a devise of the real estate, even if there had been no attempt to dispose of it otherwise (*Lynes agt. Townsend*, 33 *N. Y.*, 561; 2 *Jarman on Wills*, 741).

3. Assuming that the residuary clause is comprehensive enough, in terms, to include the real estate, or the proceeds of its sale, it is well settled that the residuary devisees or legatees cannot take any part of such real estate, or the proceeds of its sale, which the testator has devised or bequeathed, absolutely, to other persons by other clauses of the will, though such other devises or bequests are illegal and void (*Gibbs agt. Rumsey*, 2 *Ves. & Bea.*, 294; *Van Kleeck agt. Dutch Church*, 6 *Paige*, 600; *Same case in error*, 20 *Wend.*, 457; *Green agt. Dennis*, 6 *Conn.*, 292; *Williams agt. Coade*,

---

Bean agt. Bowen.

---

10 *Ves.*, 500; *Cook* agt. *Stationers' Co.*, 2 *Myl. & K.*, 262; *Hawley* agt. *James*, 7 *Paige*, 219; *Jones* agt. *Mitchell*, 1 *Sim. & St.*, 290; *Cox* agt. *Harris*, 17 *Md.*, 23; *Holmes* agt. *Franciscus*, 2 *Bland.*, 546; *Wright* agt. *The Trustees of M. E. Church*, 1 *Hoff.*, 218; *James* agt. *James*, 4 *Paige*, 115; *Tongue* agt. *Nutwell*, 13 *Md.*, 415; *Eyer* agt. *Marsden*, 2 *Keen*, 564; *Lott* agt. *Clottaway*, 3 *Beav.*, 574; *Baker* agt. *Hall*, 12 *Ves.*, 496; *Grosener* agt. *Hallam, Amb.*, 643).

4. The testator has attempted to dispose of the greater part of the proceeds of the sale of the real estate, absolutely, to legatees other than those named in the residuary clause.

5. The legacies are so adjusted, with reference to the accumulated fund, that it is impossible to ascertain how much of the proceeds of the sale of the real estate would fall into the residuum if the scheme of the will were carried out, without carrying that scheme into complete execution, and even then, it could not be known without keeping the proceeds of the sale of the land separate from the rest of the trust fund, which the testator did not contemplate.

6. As it cannot be ascertained how much of the avails of the real estate is devoted to the prior illegal purposes, by reason of the failure of those purposes, the gift of the remainder is void for *uncertainty in the amount* (*Limbry* agt. *Gurr*, 6 *Mad.*, 151; *Chapman* agt. *Brown*, 6 *Ves.*, 404; *Beekman* agt. *Bonsor*, 23 *N. Y.*, 298; *Skrimsher* agt. *Northcote*, 1 *Swanst.*, 570; *Attorney-General* agt. *Heirman*, 2 *Jac. & Walk.*, 270; *Attorney-General* agt. *Davis*, 9 *Ves.*, 535; *Floyd* agt. *Baker*, 1 *Paige*, 480).

IV. The ninth section is the *controlling* clause of the will, *determining the scheme of the testator*.

1. It directs the sale of the real estate for the purposes of the will.

2. It directs the *accumulation* of the whole of the testator's property, except \$500 given to Minnie Gray by the second section and the books specifically bequeathed by the

---

Bean agt. Bowen.

---

seventh and eighth sections, for *five years*, and a part of it for *ten years*.

3. It *fixes the time* for the payment of the legacies given by the third, fourth, fifth, tenth and eleventh sections.

4. It directs that these legacies shall be paid out of the *accumulated fund*, part in five years, and the remainder in ten years.

5. It suspends the absolute ownership of over nine-tenths of the testator's property for five years, and part of it for ten years, without any reference to life.

6. It directs the management and distribution of over nine-tenths of the property in such a way that it is impossible to ascertain that any legatee, whose legacy is payable out of the accumulated fund, has any *definite interest* in any *certain part or proportion* of the principal of the fund set apart for accumulation.

7. It creates a trust in the executors to carry out this scheme, by necessary legal implication.

8. No part of the will, except the second, seventh and eighth sections, can be separated from this scheme, or carried into effect *as the testator intended*, without carrying the whole scheme into complete execution.

V. It is a well-settled principle, that where the disposing scheme of the testator has been substantially defeated, by the failure of the illegal provisions to take effect, the court will declare an intestacy as to the whole of the estate, or so much of it as is inseparably connected with the void parts, though there are parts which, if standing alone, would be valid (*Harris* agt. *Clark*, 7 *N. Y.*, 242; *Knox* agt. *Jones*, 47 *id.*, 389; *Armory* agt. *Lord*, 9 *id.*, 403; *Hawley* agt. *James*, 16 *Wend.*, 61; *Coster* agt. *Lorillard*, 14 *id.*, 265; *Root* agt. *Stuyvesant*, 18 *id.*, 257; *Field* agt. *Field's Executors*, 4 *Sand. Ch.*, 528; *Manice* agt. *Manice*, 43 *N. Y.*, 384; *Van Beuren* agt. *Dash*, 30 *id.*, 426; *McSorley* agt. *Wilson*, 4 *Sand. Ch.*, 515).

VI. The will, or some separate part of it, must take effect,



---

Bean agt. Bowen.

---

if at all, in the way in which the testator intended and directed (Adams agt. Perry, 43 N. Y., 487; Root agt. Stuyvesant, 18 Wend., 257; Coster agt. Lorillard, 14 id., 265; Van Kleeck agt. The Dutch Church, 20 id., 457; Armory agt. Lord, 9 N. Y., 487; Tucker agt. Tucker, 5 id., 418; Van Nostrand agt. Moore, 52 id., 12).

VII. The legacies bequeathed by the *third*, *fourth* and *fifth* sections of the will are so connected with and dependent upon the illegal and void provisions of the ninth section, that they cannot be separated from those illegal provisions, nor paid, according to the testator's intention, without carrying those void provisions into complete execution; and they must therefore fall with the ninth section.

1. These legacies are made payable out of the *accumulated fund*, by the controlling force of the directions contained in the ninth section (Armory agt. Lord, 9 N. Y., 403; Van Nostrand agt. Moore, 52 id., 12; Tucker agt. Tucker, 5 id., 408, *opinion of RUGGLES, Ch. J.*).

2. This accumulated fund cannot be legally raised.

(a) The personal property cannot be accumulated for the definite periods required by the ninth section (*See point I, and cases cited*).

(b) According to the testator's scheme, a large proportion of the fund to be accumulated would be the proceeds of the sale of his real estate.

(c) The real estate cannot be sold, nor can the proceeds of its sale be applied as directed by the testator (*See points II and III*).

3. These legacies are not independent of the scheme for accumulation and suspension.

(a) The ninth section *fixes the time* for their payment.

(b) The time of payment cannot be accelerated, either with or without a rebate of interest (*Phelps agt. Phelps*, 28 Barb., 121; *Dodge agt. Pond*, 23 N. Y., 69).

(c) To disregard the ninth section and give effect to the rest of the will, would render these bequests payable in one

---

Bean agt. Bowen.

---

year after the granting of letters testamentary (2 R. S., 90, § 45), and they would then become payable out of the *principal of the personal property alone*.

(d) This would absorb the whole of the personal property, leave the real estate to descend to the testator's heirs-at-law, deprive Minnie Gray of any chance of receiving the legacy given to her conditionally by the tenth section, cut off the residuary legatees entirely, and deprive the legatee, named in the fifth section, of the greater part if not the whole of the legacy given by that section.

(e) This would not be the execution of an "independent intent of the testator, which is not bound to, nor interwoven with any other part of the will;" but it would be the breaking up of his whole plan (*Field agt. Field's Executors*, 4 Sand. Ch., 528).

4. Legacies which the testator has directed should be paid *at a future day*, out of a fund directed to be illegally accumulated, and in great measure out of the proceeds of the sale of real estate and the accumulations thereof, cannot, by judicial construction, be made payable *immediately* out of the principal or capital of the personal property alone (*See point VI, and cases cited*).

5. As these legacies are payable at a future day out of a fund to be accumulated, and in great measure out of *income* to accrue after the testator's death, the interest of the legatees is *future* and *expectant*, and, therefore, *inalienable* (*Hone agt. Van Schaick*, 7 Paige, 221; *Graff agt. Bonnett*, 31 N. Y., 9; *Campbell agt. Foster*, 35 id., 361; *Gott agt. Cook*, 7 Paige, 521; *Arnold agt. Gilbert*, 3 Sand. Ch., 531; *Clute agt. Bool*, 8 Paige, 83; *Butler agt. Butler*, 1 Hoff., 244; *De Peyster agt. Clendenning*, 8 Paige, 295; *Field agt. Field's Executors*, 4 Sand. Ch., 528).

6. This limitation or suspension cannot be less than five years, and it is not measured by life, and the legatees are not minors.

7. The three sections of the will under consideration, read

---

Bean agt. Bowen.

---

in connection with the ninth section, as they must be, suspend the absolute ownership of the whole fund set apart for accumulation for five years, and part of it for ten years; and this renders the legacies payable out of that fund at the end of the periods of suspension void (*Hone agt. Van Schaick*, 7 *Paige*, 221; *Dodge agt. Pond*, 23 *N. Y.*, 69; *Harris agt. Clark*, 7 *N. Y.*, 242; *Armory agt. Lord*, 9 *id.*, 403; *Coster agt. Lorillard*, 14 *Wend.*, 265; *Knox agt. Jones*, 47 *N. Y.*, 489; *Hawley agt. James*, 16 *Wend.*, 61; *Beekman agt. Bonsor*, 23 *N. Y.*, 315; *Gott agt. Cook*, 7 *Paige*, 521).

VIII. The legacy to Minnie Gray, conditionally, by the tenth section, is manifestly a part of the illegal scheme for suspension and accumulation, and wholly dependent upon it.

1. It is directed to be paid, if at all, at the final settlement of the testator's estate.

2. The testator did not intend that such final settlement should take place until the expiration of ten years after his decease.

3. The executors are directed to pay this "additional five hundred dollars" to the legatee, "if, in their judgment, she shall have used the previous bequest in a careful and prudent manner."

4. The time which the testator intended to give his executors to make the necessary observations to enable them to form this judgment, is the whole period which should elapse between the time fixed for the payment of the previous bequests and the final settlement of his estate at the expiration of ten years after his death.

5. This bequest is, therefore, *contingent* as well as *future*.

6. It is limited to take effect, if it shall ever take effect, at the expiration of ten years after the testator's death.

7. Such a limitation of a future *contingent* interest, for a definite period, is clearly void.

8. The tenth section is subject to all the objections which have been urged against the third, fourth and fifth sections.

9. Unless the ninth section shall be fully executed there is



---

Bean agt. Bowen.

---

no possibility of paying this legacy, no matter how carefully and prudently the legatee may use the previous bequest.

IX. The eleventh section of the will is also a part of the illegal scheme, and it cannot be separated from it.

1. The distribution is directed to be made at the final settlement of the estate, after all the other legacies shall have been paid.

2. The testator did not intend that this settlement should be made until the expiration of ten years after his death; and, if all the provisions of the will were carried into effect, it could not take place sooner.

3. "The balance of the estate," which the testator intended to give to the residuary legatees, is the balance of the accumulated fund at the end of the second period of suspension, after all the other legacies should be paid in the manner and at the times provided for in the ninth section.

4. This section is subject to all the objections against the third, fourth, fifth and tenth sections.

(a) The bequests are future and expectant, and dependent upon the accumulation of the trust fund.

(b) The residuary legatees may, or might, if the will were valid, take the \$500 bequeathed by the tenth section, in case Minnie Gray should not prove to be entitled to it, and this contingency cannot be determined until the trust term expires.

(c) These bequests being *future* and payable out of a fund to be accumulated, the interests of the legatees are inalienable, and the absolute ownership of the fund is suspended.

(d) This suspension is unlawful, and the bequests are void, and none the less so because they are of "the balance of the estate," for the testator could no more violate the law by the residuary bequests than by any other provision of the will (*Vail* agt. *Vail*, 7 *Barb.*, 226; *Dodge* agt. *Pond*, 23 *N. Y.*, 69).

(e) Unless the directions contained in the ninth section shall be carried out, the eleventh section cannot take effect as the testator intended.

---

Bean agt. Bowen.

---

*Geo. W. Rawson*, for certain legatees.

I. That only the *direction to accumulate* is void. That the will may take effect, discharged from the *direction to accumulate*. No provision of the will is dependent upon the accumulation, and the effect of the accumulation would simply be to increase the amount going to the residuary legatees.

The general scheme of the will will not be substantially affected by declaring the direction to accumulate void (*Dodge agt. Pond*, 23 *N. Y.*, 69; *Kilpatrick agt. Johnson*, 15 *N. Y.*, 322; *Kane agt. Gott*, 24 *Wend.*, 641; *Williams agt. Williams*, 8 *N. Y.*, 525; *Manice agt. Manice*, 43 *N. Y.*, 303; *Harrison agt. Harrison*, 36 *N. Y.*, 543).

In these cases the courts sustained the provisions of the will, although declaring the direction for accumulation void. I think it will be found on a careful examination of these cases, and others, that this case is clearly within these decisions.

II. There is no express trust created by this will.

The powers conferred upon the executors by this will are not such as require that a trust shall be implied. None of the duties imposed upon them are such as to make it necessary that they should take any legal estate, and no trust, therefore, arises by legal implication.

No legal estate will ever be implied, unless such estate is essential in order to carry out the provisions of the will (*Coates agt. Cook*, 3 *Burr.*, 1685, 5th of *B. & A.*, 785; *Reed agt. Executors of Fisher*, 12 *Barb.*, 113).

(a) There is nothing in this case which makes it necessary that any trust shall exist in the executors. Every duty imposed upon them by the will may be performed by a simple power, such as is given them in this will. They have no control over the real estate or the rents and profits as such. They simply have a power to sell it, and this gives them no legal estate and requires no trust whatever (*Reed agt. Fisher*, 12 *Barb.*, 113).

The widow takes the real estate for life; upon her death

---

Bean agt. Bowen.

---

the executors are empowered to sell it; the whole then becomes personal estate, which they are directed to invest for accumulation until the time of division arrives.

There is not a single duty imposed that cannot be performed under the simple power given by the will.

(b) To establish this trust is an important matter for the contestants, and, unless they can maintain it, their main argument fails entirely. Let us therefore examine the authorities by which they seek to establish "a trust by implication." From a careful examination of all these authorities I am entirely confident they do not apply to this case, and do not sustain the position of the contestants' counsel.

The case of *Knox* agt. *Jones* (47 N. Y., 389) was a case of express trust, and, of course, does not apply. The cases of *Brewster* agt. *Stryker* (2 N. Y., 19) and *Stryker* agt. *Mott* (2 Paige, 387) were cases where the testator had declared that his *real estate* should be under the *charge, management and disposition of his executors*. That the same should not be *sold or aliened*; but his executors and the survivor of them should lease the same, receive the rents and profits, and pay them over to certain of the devisees annually, and with power to *lease to the devisees*. The court held that the will gave the executors such control over the real estate as necessarily required that they should hold the legal title, and hence a trust must be implied.

So in the case of *Bradley* agt. *Amidon*, the court held that the will gave the executor a control over the *lands, rents and profits*, which *necessarily required* that he should hold the *legal title*, and hence a trust must be implied.

All these cases are widely different from this, and I think the contestants' counsel will search in vain for a case like this, one in which the court has ever held that the executor necessarily took the legal title.

III. There is no suspension of the absolute ownership of personal property by this will.

There being no trust, express or by implication, the legatees



---

Bean agt. Bowen.

---

take a *present vested interest* in the legacies given them in and by the will. The interests of the legatees are not inalienable.

The time of payment only is postponed. This is not illegal and does not suspend at all the absolute ownership of the property (*Burrill agt. Sheil*, 2 Barb., 470; *Kane agt. Gott*, 24 Wend., 641; *Dodge agt. Pond*, 23 N. Y., 69). In the case of *Dodge agt. Pond*, judge SELDEN, speaking of what the testator has a legal right to do, says: "He may give vested legacies and provide for their payment at a future day," and then he proceeds to show that the absolute ownership is not suspended in such a case.

The legacies in this case were vested beyond question (*Patterson agt. Ellis*, 11 Wend., 259; *Hone agt. Van Schaick*, 20 Wend., 564). There is therefore no suspension of the absolute ownership of property in this case.

The effect of the provision of the ninth section of this will, if carried out, would be, what judge SELDEN says it would be, in the case of *Dodge agt. Pond*, at page 83: "*Its effect would be simply to increase slightly the ultimate fund to be distributed among the residuary legatees.*" If declared illegal and not carried out, the only effect would be to diminish that fund.

IV. There is no difficulty in carrying out the general scheme of the will and declaring the direction for accumulation void. The court held, in *Kane agt. Astor* (5th of Sand., 467), that it is a paramount principle that the court shall carry out the general intent of the testator; and where a particular word, sentence or provision is repugnant to the general intent and design of the whole will, such word, sentence or provision must give way, rather than sacrifice the whole scheme of disposition disclosed by the general tenor of the instrument.

This is in harmony with numerous decisions of the courts, and this brings us to the inquiry—what was the general scheme in the testator's mind, as appears by the will itself?

---

Bean agt. Bowen.

---

1. That the whole income of his estate should go to his wife for her support during her natural life.

2. That upon her death all his property, with the exception of \$500 to Minnie Gray, should go to the benevolent objects therein stated.

3. That the bulk of all his property should go to the three institutions named in the third, fourth and fifth clauses of his will; and, in case his property for any reason should not be sufficient to pay these in full, he provides in the sixth clause that those three legacies shall be paid in the order in which they stand.

4. If there was any residue after paying those legacies, it should go to the institutions named in the residuary clause, leaving with the executors a discretion as to whether Minnie Gray should receive an additional \$500, if the property should be sufficient.

This was manifestly the general scheme and intent in the mind of the testator. The provision, that the executors should hold it for distribution and in the meantime for accumulation, instead of being the foundation of the scheme and the pivot on which everything else turns, it was a *mere incident* to the scheme itself. It was simply *his way of distribution* and settlement of the estate.

Can it with any justice or even plausibility be said that the scheme of the will fails and that the intention of the testator cannot be carried out because it cannot be done in just the way he intended, because the residuary legatees will receive somewhat less than they otherwise would?

In all the cases to which I have referred and others, where the court has held the direction to accumulate void, and yet has sustained the will, of course the intention of the testator was not fully carried out; but I have not found a case in which they did not carry out the general intention of the testator, wherever it could be done, although the direction to accumulate was declared void.

The property in this case amounts, as appears by the com-

---

Bean agt. Bowen.

---

plaint, to \$8,626.79. Giving Minnie Gray her \$500, we have left \$8,126.79. Paying the next three legacies of \$2,000 each, we have still remaining \$2,126.79; and, if the additional \$500 is paid to Minnie Gray, there will remain \$1,626.79 to go to the residuary legatees.

Why will not this carry out the intention of the testator? True, the residuary legatees will receive some less than they would if the accumulation were valid.

Conceding the proposition of the counsel that some part of the will must take effect according to the intention of the testator, and we say that the main provisions of this will can be carried out according to his intention.

The direction to sell the real estate in this case is not void.

The provision for accumulation did not render the sale necessary. The real estate might have been held for accumulation without sale. The sale was necessary in order to pay the legacies, and is in no way illegal.

The counsel for the contestants in this case claims that the real estate must be regarded as converted into personal property, and the whole fund must be treated as personal property, and the questions arising must be determined by the law applicable to personal property; and yet, again, he claims that the power to sell must be held to be a part of the illegal scheme, and void.

If so, then there has been no sale of the real estate, and it is not converted into personal property.

The policy of the law is that wills shall be favored and sustained, and courts will see to it that the intention of a testator is not defeated in any case where it can be substantially carried out.

In this case the testator had no lineal descendants. He was a clergyman, and his intention was that his property should go to these benevolent objects.

The court will carry out that intention where it can so manifestly be done in harmony with the well-defined principles of law and equity.



---

Bean agt. Bowen.

---

*A. B. Capwell*, for other legatees.

*First.* It is plain that it was the intention of the testator, by his will, to dispose of his entire estate, real and personal.

And it is also plain that he intended to give his entire estate, after the decease of his wife (who died before him), to Minnie Gray and the six corporations named.

This intention should be respected and carried into effect, if it can be done without clearly violating the rules of law applicable to such cases.

*Second.* The real estate has been sold by the executors for \$3,000, and the personal property was appraised at \$5,626.79, making a total of \$8,626.79.

The specific legacies or bequests amount to \$7,000, thus leaving a small sum to be distributed to the residuary legatees.

I. The several legacies or bequests in sections second, third, fourth and fifth are direct gifts to Minnie Gray and the societies named; and as the estate of testator was sufficient to pay them in full, it could not have been, it was not, his intention that they should take any part of the accumulation provided for in the ninth section.

II. It is clear, therefore, that if the ninth section, or so much thereof as provides for an accumulation, shall be declared void, still the intention of testator can be carried into effect as to the whole of his estate; only the residuary legatees will receive less in amount, but at an earlier day.

III. Counsel for the heirs admits that Minnie Gray is entitled to the \$500 in the section second; and yet the objections urged against the remaining bequests would seem to be quite as applicable to that.

*Third.* The residuum or "balance of the estate" is given directly and absolutely to the three societies named in the eleventh section; the division to be made "at the final settlement of the estate," whenever that may be.

I. It is true the accumulation mentioned in the ninth section, if legal, would add to the amount these residuary legatees

---

Bean agt. Bowen.

---

would receive at the times therein mentioned ; but the direction for accumulation is clearly void.

II. This being a direct gift of personal property and of its income to be accumulated, after or upon a future event certain, *without any trust*, the accumulation being illegal, the residuary legatees will take the income presently, and as it accrues (SUTHERLAND, J., in *Lovett agt. Kingsland*, 44 Barb., 575).

III. And it is upon this principle that Minnie Gray can take under the second section.

*Fourth.* These defendants, therefore, submit that the several bequests in this will should be declared valid, and that only so much of the ninth section as is in conflict with the law against accumulations, be declared void.

MORGAN, J.—There is no dispute as to the facts of this case. The testator's estate was of the value of about \$8,626.74 ; his real estate, consisting of a house and lot, was of the value of \$3,000. He bequeathed the use of his real and personal estate to his wife, in case she survived him, during her natural life, and so much of the principal as might be necessary for her comfortable support. He then gave legacies of \$100 and \$400 to Minnie Gray, which are admitted to be valid. Next he gave legacies of \$2,000 each to three theological institutions, to be paid in the order named. Next he gave specific legacies of certain books to two institutions named, of no great value. As these legacies amounted to \$6,500, the personal estate, liable to be diminished by the bequest to the testator's wife, would not be sufficient to pay them, unless it were suffered to accumulate according to the directions of the testator in the ninth clause, or unless it should be increased by adding to it the proceeds of the sale of the real estate. The testator, however, made ample provision for the creation of a fund sufficient to pay these legacies ; and, anticipating a residue, made provision for the disposition of that also.

His wife having died prior to his death, no question can

---

Bean agt. Bowen.

---

arise as to the bequest to her. Nor is it perceived how the bequest of a life estate to her can affect the validity of the subsequent provisions of his will.

It might have been an interesting inquiry, if she had survived the testator, to ascertain in whom the reversion of the real estate vested; because it was not devised, in terms, to any one, and it certainly could not be in abeyance, awaiting the action of the executors to convert it into personalty.

The whole question in dispute arises out of the provisions of the ninth clause of the will. By that clause the executors are directed, as soon as convenient after the death of the testator and his wife, to sell all his real and personal property, except his United States bonds and his stock in the Skaneateles Iron Works, and invest the proceeds for accumulation, and to hold the whole amount, including the bonds and stock, for accumulation for five years. The executors are then directed, after the expiration of said five years, to convert the said accumulation into cash (except the stock in the Skaneateles Iron Works), and to pay the three legacies of \$2,000 each to the three theological institutions in the order named, so far as said accumulation shall provide for such payment. They are directed to hold the stock in the Skaneateles Iron Works five years longer; and, at the expiration of that period, the said stock and the accumulations thereof are to be converted into cash by the executors, and the remaining portion of the three legacies above mentioned paid. Afterward, on a final settlement of the estate, if there are sufficient funds, the executors are required to give Minnie Gray an additional \$500, if in their judgment she shall have used the previous bequest in a careful and prudent manner; and the residue, after payment of all the previous bequests, the executors are directed to divide equally between three religious societies therein named.

It will therefore be seen that, as to the real estate, the testator, without any words of gift or devise, clothes his executors



---

Bean agt. Bowen.

---

with a power of sale, and they are to take the proceeds as personal property.

After realizing the cash from a sale of the real and personal property, they are directed to hold it five years for accumulation, and then convert it again into cash and pay the three legacies of \$2,000 each in the order named, so far as said accumulation shall provide funds for that purpose. Of course this fund must be under the control of the executors, and must be invested, collected and reinvested in their names.

In my opinion the authority given to sell the real estate is a power *in trust*, and the proceeds of the sale of both the real and personal property are by necessary implication given to the executors, *in trust*, to manage for the purpose of raising a fund out of which to pay the \$6,000 in legacies, limited to take effect after five years; and the contingent legacy to Minnie Gray, and the residuary legacies, to take effect, if at all, after a term of ten years.

It is admitted that the direction for accumulation must be regarded as illegal and void. In that case the annual income would belong to the next of kin or the residuary legatees. If it should be determined that it belonged to the *residuary legatees*, the testator would succeed in evading the statute, for he would be allowed to do indirectly what he is not permitted to do directly.

A great many questions may arise out of the peculiar provisions of this will which it will be unnecessary to determine, as I have arrived at certain definite results which will dispose of the case and which I will proceed to state.

(1.) Although there is no *trust term* granted to the executors, in words, such a term is necessarily to be implied. The directions to sell the real estate and to convert all his property into cash (with certain exceptions), and to hold the proceeds for a term of five years, with directions to invest the same in the meantime, and after payment of certain legacies to hold his stock in the Skaneateles Iron Works five years

---

Bean agt. Bowen.

---

longer, and after paying the balance of the three legacies of \$2,000 each, to divide the residue, which they may diminish by an exercise of discretion in giving another \$500 to Minnie Gray, impose upon the executors active duties as trustees of his estate, as much as though the testator had, in terms, described them as such. The executors necessarily took the legal title and the right to the possession of the property, if the directions of the testator can be sustained, according to his manifest intention. Even as to real estate, courts have implied an estate in the executors *as trustees*, although no estate was given to them in words (*Perry on Trusts* § 313; *Hill on Trustees*, 231, 239; *Brewster agt. Striker*, 2 N. Y., 19). And certainly there is no reason why the executors should not be deemed to have the legal title to the personal estate when similar duties are enjoined upon them (*See Knox agt. Jones*, 47 N. Y., 396). Personal property is subject to trusts as well as real estate, and the statute of perpetuities can no more be violated in the disposition of personal property than of real estate.

(2.) The trust estate given to the executors cannot be sustained. It is limited to five years and ten years, and such a term is unauthorized (*Hone agt. Van Schaick*, 7 Paige, 233).

(3.) The gifts of the three legacies of \$2,000 each are limited to take effect after a prescribed period of accumulation, and to be paid out of the accumulated fund as part of the subject matter of the gifts. The period being too remote, the gifts must fail (*Perry on Trusts*, § 396). Legacies dependent on a void trust fall with it (*Arnold agt. Gilbert*, 3 Sand. Ch. R., 531; *Armory agt. Lord*, 9 N. Y., 403).

A gift is too remote, unless, according to the intention of the testator, some person must necessarily be in existence with legal power to dispose of the property within the period limited by the rules of law (*Curtis agt. Lunkin*, 5 Beav., 147; *Palmer agt. Holford*, 4 Russ., 403). If the trust exceed this boundary, it is void *in toto*, and cannot be cut down to the legitimate extent (*Lewin on Trusts*, 71, 72).

---

Bean agt. Bowen.

---

The gifts in the second clause, of \$100 and \$400 to Minnie Gray, are entirely separable from the legacies subsequently given, and also from the trust scheme, and may be sustained; for the statute against perpetuities only cuts off estates which are limited to take effect after the prescribed limit (DENIO, J., *in Post* agt. *Hover*, 33 N. Y., 598).

(4.) As the trust must be declared void for contravening the statute of perpetuities, the real estate of the testator will descend to his heirs-at-law (1 R. S., 723, § 14; *Post* agt. *Hover*, *supra*, 599). And of course the personal estate must be distributed to the next of kin.

(5.) These conclusions have been arrived at, although the decisions cited by the counsel for the legatees clearly show that in construing wills the court is at liberty to reject the direction for accumulation. If there was a valid trust, the gift might take effect by rejecting these directions; but the difficulty is, that the trust is in direct contravention of the statute of perpetuities, and the legacies of \$2,000 each, as well as the contingent legacy, are only to take effect upon the termination of a trust which is void. If the gifts are paid, they must be paid by the executors after five and ten years, for the period cannot be shortened; and they cannot be paid out of the fund provided for that purpose by the testator, but in due course of administration. This would entirely defeat the scheme devised by the testator for the disposition of his estate; and I do not think the courts are at liberty to strike out the trust term, as well as the directions for accumulation, for the purpose of paying legacies which are made dependent upon it. This would not be carrying out the will of the testator, but, in effect, making a new will.

If I am right in these conclusions, the result will be that the executors had no authority to sell the real estate for the purpose of creating a fund as directed by the testator; nor was there any valid conversion of the real into personal estate. It was not the intention of the testator that the real estate should be converted into money for the purpose of distribu-



---

Bean agt. Bowen.

---

tion among his next of kin. There could be no conversion legally effected for the purpose of funding the *trust estate*; and no other object was contemplated in authorizing a conversion.

The bequests to Minnie Gray of \$100 and \$400 are valid and should be paid out of the personal estate. The specific bequests of books in the seventh and eighth clauses of the will are also valid. The other legacies must fail with the void trust, upon the termination of which they were to take effect. Judgment must be entered accordingly.

---

Dutchess County Mutual Insurance Co. agt. Hachfield.

---

## SUPREME COURT.

THE DUTCHESS COUNTY MUTUAL INSURANCE COMPANY,  
respondent, agt. ALBERT HACHFIELD and others, appel-  
lants.

*Purchase of stolen bonds—for value and without notice.*

A municipal bond, payable in blank, with the addition following the blank of the terms "his executors, administrators or assigns," &c., is *negotiable* under the mercantile law.

Where the evidence on the trial showed that such bonds had been feloniously stolen from the plaintiff, their lawful owner, shortly before they were purchased by the defendants, *held*, that this imposed the obligation upon the defendants of proving, to the satisfaction of the jury, that their purchase was made for value, and in good faith, before they could establish a title to the bonds superior to that of the plaintiff as the preceding owner.

Where fraud or illegality in the negotiation of commercial paper is shown, the law presumes a want of consideration in the transfer, and this presumption must be rebutted by the holder showing affirmatively that he gave value.

Proof on the trial was given by the defendants, tending to overcome the presumption arising out of the circumstance that the stolen bonds were found in their possession, by showing that they were purchased by them for a valuable and adequate consideration, without notice of any infirmity in the title of their vendor.

After the charge of the court had been delivered to the jury, the defendants' counsel requested the court to instruct the jury that if "Hachfield & Co. purchased these bonds in the open market for full value, and in the usual course of business, without notice or suspicion, they were not bound to make a close and critical examination in order to escape the imputation of bad faith in the purchase." The court declined to charge this proposition, and left it to the jury to say how much of an examination they were to make, and the defendants excepted to the refusal.

*Held*, that this was error. The proposition presented by this exception seemed to be faultless. It presented the case of a purchase for full value, in the ordinary course of business, without notice or suspicion

---

Dutchess County Mutual Insurance Co. agt. Hachfield.

---

of the robbery creating the infirmity of title. And that was all which the law required to be established to protect the defendants as the owners of the bonds.

Judgment reversed, and a new trial ordered, with costs to abide the event.

*First Department, General Term, May, 1874.*

*Before* NOAH DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from judgment, and also from order denying motion made on the judge's minutes for a new trial.

*Coles Morris and Michael H. Cardoza*, for appellants.

This was an action of replevin, brought by the plaintiff against the defendants to recover the possession of five city of Poughkeepsie bonds of \$1,000 each, held by the defendants, and claimed by the plaintiff as its property. On the night of the 8th or morning of the 9th of October, 1869, a robbery took place at the office of the plaintiff; their safe was blown open, and these bonds and other securities were stolen therefrom. The form of the bond appears in the case.

The defendants were brokers, doing business in this city, dealing in bonds and other securities. The defendant Hachfield attended personally to the department of buying and selling bonds. They purchased these bonds on November 9th, 1869, of one Edward Kendrick, at ninety-six cents on the dollar, their fair market value, in the ordinary course of their business, paid for them by a check drawn by Stoker, Taylor & Co., bankers, to their (defendants') order, and indorsed by the latter to Kendrick & Co., or order. At the time of this purchase none of the defendants had the slightest notice, knowledge or suspicion that these bonds had been stolen, and it was not until the close of business on the day of the purchase that they heard that some Poughkeepsie city bonds had been stolen.

The defendants then made further inquiry; could not



---

Dutchess County Mutual Insurance Co. agt. Hachfield.

---

ascertain the numbers of the stolen bonds, and telegraphed to Poughkeepsie for that purpose, as they desired to know whether the bonds were all right, having sold them, and intending to deliver them on the following day.

They then first discovered that they had purchased stolen bonds, and were then, for the *first* time, informed of this robbery at Poughkeepsie.

Immediately upon hearing that they had the stolen bonds in their possession, the defendants went to the bank on which the check they had given in payment therefor was drawn, endeavored to stop it, but this they could not do, as it had been certified, and stood as an indebtedness against the bank.

The reputation of Kendrick at the time the defendant purchased these bonds was very fair, and he seems to have been more the victim of circumstances than a wrong-doer.

The defendant Hachfield had, previously, some sixteen or seventeen transactions with Kendrick, all of which, with one exception, and this had been abundantly explained, had been perfectly satisfactory and free from suspicion.

Hachfield, in view of the danger attending these transactions, as a prudent man, recollecting the other affair with Kendrick, cautioned the latter to be sure the person from whom the bonds came was all right; was assured of his responsibility; that he, Kendrick, had dealt with the man before, and had always found him perfectly straightforward.

It is not the custom for brokers to disclose their customers' names, and therefore was it that Hachfield did not inquire of Kendrick the name of his principal.

It appears that, in the course of dealing in negotiable securities, purchasers in good faith often obtain securities which afterwards prove to have been stolen.

The *only* witness examined on behalf of the plaintiff was Le Grand Dodge, who proved nothing but the loss of the bonds in question by the plaintiff and their production by the defendants at the Jefferson-market police court. The

---

Dutchess County Mutual Insurance Co. agt. Hachfield.

---

only testimony by which it was *attempted* to destroy the title of the defendants was by the cross-examination of the defendants' *own* witnesses, and this by endeavoring to show that which was entirely immaterial, viz., that because the defendant Hachfield had previously one transaction with Kendrick which related to stolen bonds, but which had been well explained, therefore the defendants were prohibited from again dealing with Kendrick at all, or, at any rate, without first ascertaining that Kendrick's principal was really a *bona fide* holder.

But the defendants had no suspicion that these bonds were stolen; this former transaction left no unfavorable impression on Hachfield's mind. Hachfield's confidence in Kendrick remained unimpaired, for he had subsequent dealings with him that were free from any question. The defendants showed no anxiety to purchase, and Kendrick was in no hurry to sell these bonds, the negotiations extending over several days. After they were offered to them by Kendrick they wrote to Poughkeepsie and Albany, describing the bonds, and asking for a bid. Mr. Rudd, the cashier of a Poughkeepsie bank, replied, offering ninety-five per cent, Mr. Van Antwerp, of Albany, ninety-eight per cent, no allusion to the robbery being made; and upon the strength of the latter's bid they purchased at ninety-six per cent, expecting to make a profit of one hundred dollars.

The defendants made no attempt to deliver the bonds when they found they were stolen, but retained them and produced them at the police court, and assisted as far as possible in the prosecution of Kendrick.

The defendants expressly and positively *deny any bad faith* in the premises, and the entire evidence shows that they acted with abundant caution and prudence, with proper care and circumspection.

The verdict was for the plaintiff; judgment was entered thereon in their favor; defendants moved for a new trial, which motion was denied, and defendants appealed from the

---

Dutchess County Mutual Insurance Co. agt. Hachfield.

---

judgment herein and from the order denying the motion for a new trial.

I. The plaintiffs' case showed that the defendants had a perfectly valid title to the bonds, because the bonds were negotiable securities, transferable by delivery.

The defendants purchased the bonds in the ordinary course of business for the full value.

This is shown by the evidence of Mr. Dodge, the secretary of the plaintiffs, that Hachfield paid ninety-six per cent for the bonds.

This evidence, having been admitted without objection, has the same weight as if it were the evidence of Hachfield himself.

Ninety-six per cent was certainly the full value of the bonds; there was no fixed market value for them; they were never introduced on the brokers' board in New York city; they were the obligations of a distant municipal corporation, always ready to sell them at par; they were rarely dealt in.

Their market value must, therefore, have been such price as one wishing to sell could obtain, which, in this case, was ninety-six per cent.

The bonds being negotiable securities, passing by delivery, and the defendants having paid full value for them in the ordinary course of business, their title is good against the original owner, unless it is shown that they acted in bad faith.

There is no evidence of bad faith in the plaintiffs' case; there is no evidence that the plaintiffs ever gave any notice of their loss. The defendants did not learn that the bonds were stolen until after they had bought and paid for them.

They had received from Kendrick positive assurances to the contrary.

In the absence of all evidence on this point the court should have dismissed the complaint.

II. The verdict was erroneous, contrary to the law and the evidence. It should be set aside and a new trial granted.



---

Dutchess County Mutual Insurance Co. agt. Hachfield.

---

(a) The only question for the jury was, did the defendants act in bad faith?

The evidence is overwhelming that they did not.

(b) The bonds were negotiable securities and passed by delivery.

(c) It is well settled that a bond, whether of a railroad or of a municipal corporation, which is by its terms payable to blank or assigns, is a negotiable security, and is transferable by delivery (*Brainard* agt. *New York and Harlem R. R. Co.*, 25 *N. Y.*, 496; *Van Duzer* agt. *Howe*, 21 *id.*, 531; *The Bank of Rome* agt. *The Village of Rome*, 19 *id.*, 20; *Mechanics' Bank of New York* agt. *New York & New Haven R. R. Co.*, 3 *Kern.*, 599-625; *State of Illinois* agt. *Delafield*, 3 *Paige*, 527; *White* agt. *Vermont & Mass. R. R. Co.*, 21 *How.* [U. S.], 575).

III. The evidence is uncontradicted that the defendants purchased these bonds in the usual course of business; that they paid full value for them, and that they had not the slightest notice, knowledge or suspicion that the bonds were stolen.

(a) These facts were *conclusive*, and for the plaintiff to show fraud or bad faith on the part of the defendants became impossible. In this way alone could the title of the defendants to the bonds in question be defeated.

(b) The burden of proof was on the plaintiff, for, as the court say, in *Murray* agt. *Lardner* (2 *Wall.*, 121):

"The burden of proof lies on the person who assails the right claimed by the party in possession."

And the decision of the supreme court of the United States may be truly "regarded as settling the law of the land" (DALY, Ch. J., *Seybell* agt. *The National Currency Bank*, 2 *Daly*).

(c) The defendants manifested *no negligence* whatsoever in this transaction, and even if they had been guilty of *gross negligence*, this would not vitiate their title to these bonds (*Welch* agt. *Sage*, 47 *N. Y.*, 146).

---

Dutchess County Mutual Insurance Co. agt. Hachfield.

---

(d) They were called upon to make no critical examination; they were not bound to be on the alert for circumstances that might excite the suspicions of wary vigilance; they owed not the duty of active inquiry to any one; they were not required to manifest such care as diligent, prudent men would exercise (*Welch* agt. *Sage*, *supra*; *Magee* agt. *Badger*, 34 *N. Y.*, 247; *Belmont Branch Bank* agt. *Hoge*, 35 *N. Y.*, 65; *Birdsall* agt. *Russell*, 29 *id.*, 220; *Lord* agt. *Wilkinson*, 56 *Barb.*, 295; *Goodman* agt. *Simonds*, 20 *How. [U. S. R.]*, 365; *Goodman* agt. *Harvey*, 4 *Ad. & El.*, 870).

In *Magee* agt. *Badger* (*ut supra*), judge PORTER, delivering the opinion of the court, says:

“One who purchases commercial paper for full value, before maturity, without notice of any equities between the original parties, or of any defect of title, is to be deemed a *bona fide* holder. He is not bound at his peril to be upon the alert for circumstances which might possibly excite the suspicions of wary vigilance. He does not owe to the party who puts negotiable paper afloat the duty of active inquiry to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and *not by a speculative issue as to his diligence or negligence.*”

And precisely the same doctrine is reiterated by the court of appeals in the subsequent case of *Belmont Branch Bank* agt. *Hoge* (*ubi supra*).

In *Welch* agt. *Sage* (47 *N. Y.*, 146), the late justice PECKHAM says:

“The law may be regarded as settled, that a purchaser, for value advanced, of negotiable paper, *including bonds*, is not bound to exercise such care and caution as wary, prudent men would exercise. Negligence will not impair his title. It is simply a question of good faith in the purchaser; unless the evidence makes out a case upon which the jury would be authorized to find fraud or bad faith in the purchaser, it is the duty of the court to direct a verdict.”

---

Dutchess County Mutual Insurance Co. agt. Hachfield.

---

In *Lord agt. Wilkinson* it is said, "that the purchaser is not bound to be on the alert; he does not *owe* the duty of active inquiry to avert the imputations of bad faith."

In *Goodman agt. Harvey* (4 *Ad. & El.*, 870), lord DENMAN says:

"I believe we are all of opinion that *gross* negligence only, would not be a sufficient answer where the party has given a consideration for the bill. Gross negligence may be evidence of *mala fides*, but it is not the same thing. We have shaken off the last remnant of the contrary doctrine. Where the bill has passed to the holder, without any proof of bad faith in him, there is no objection to his title."

It may well be said that, to establish any other rule than that here enunciated, would paralyze the commercial interests of the country.

That this is the law that ought to govern in the determination of this case, there can be no possible doubt. The authorities cited are directly in point and controlling.

IV. The learned judge, in his charge to the jury, misconceived the law applicable to the case.

True, he does say that the question is as to the *bona fides* of Hachfield & Co., in making the purchase of these bonds; but his charge is clearly erroneous in many parts. In fact, as a whole, it is apparent that it cannot be sustained upon the law or on the evidence in the case. It evidently misinformed and misled the jury.

He instructed the jury that the defendants must have procured the bonds in such a shape as would not have put a prudent man upon inquiry; this was clearly erroneous. That there should be nothing to call upon the defendants to be on their guard, or to be put upon inquiry; this is also erroneous, material, and prejudicial to the defendants.

V. "Notwithstanding the omission of defendants' counsel to ask that a verdict be directed in their favor, a motion having been made for a new trial upon a *case*, and an appeal having been duly taken from the order denying such motion,



---

Dutchess County Mutual Insurance Co. agt. Hachfield.

---

this court is now at liberty to look into the case for the purpose of seeing whether the merits of the case have been *fully and fairly* tried, and whether any injustice has been done" (MONELL, J., *Lennox* agt. *Hoppock*, 1 *Sweeney's Sup. Court Reps.*, 476; *Archer* agt. *Hubbell*, 4 *Wend.*, 514; *Geer* agt. *Archer*, 2 *Barb.*, 420; *Hastings* agt. *McKinly*, 3 *Code Rep.*, 100).

In *Geer* agt. *Archer* (2 *Barb.*, 423), WELLES, J., says:

"On a motion for a new trial upon a case, for the misdirection of the judge in his charge to the jury, it is not necessary that the charge should be excepted to."

VI. In addition to the foregoing considerations, it is respectfully submitted that the following exceptions are abundantly well taken, and should prevail:

(a) Defendants' counsel requested the judge to charge: "If the jury find that Hachfield & Co. purchased these bonds in the open market for full value, and in the usual course of business, without notice or suspicion, they were not bound to make a close and critical examination in order to escape imputation of bad faith."

This the court refused to do, saying that it would leave to the jury how much of an examination they were to make.

This refusal so to charge was certainly erroneous, and defendants' exception is well taken.

VII. This verdict is most grievously wrong; it is in violation of law; it has done manifest injustice.

(a) The right and duty of the general term of this court to set aside this verdict cannot be disputed. PECKHAM, J., in *Smith* agt. *Ætna Life Ins. Co.* (49 *N. Y.*, 211), referring to the general term of this court, says:

"It is their duty to set aside a verdict which is against the clear weight of the evidence; not merely, as this, against the evidence. Justice would be promoted if the supreme court should more frequently exercise its *unquestioned right* of reviewing verdicts upon the facts."

(b) There is every reason to apprehend that the jury was

---

Dutchess County Mutual Insurance Co. agt. Hachfield.

---

misled by prejudice, or labored under gross misapprehension as to the law and facts. "It is, therefore, the imperative duty of the court to set aside a verdict which is clearly against the weight of the evidence" (*Burlew* agt. *Hubbell*, 1 *Sup. Court Reps.*, 237).

*Albert Stickney*, for respondents.

The plaintiff's suit is brought to recover bonds, or the value thereof, admitted to have been the plaintiff's property, and admitted to have been stolen on the 9th October, 1869.

It is not contradicted that the defendants purchased the bonds of one Kendrick, on the 9th October, 1869, and that they paid therefor ninety-six per cent of the par value, *i. e.*, \$4,800.

The defendants testified that they had neither knowledge, information or suspicion that the bonds were stolen, or that Kendrick was not the real owner of the bonds.

Nor is there any witness who testified directly, in express terms, to the contrary.

Hachfield himself, however, testified he had had a transaction in stolen bonds before this one in question, with Kendrick.

Kendrick then came to Hachfield, and asked him if he, Hachfield, "could use" some Poughkeepsie bonds. This was about ten days only after the robbery.

Hachfield then offered the bonds to no New York broker or dealer.

But he immediately wrote to several out-of-town parties. Among them was one Van Antwerp, who made Hachfield an offer of ninety-eight. And Van Antwerp had been mixed up in another stolen bond transaction with Hachfield and Kendrick.

Hachfield says he had no suspicion or knowledge of the bonds being stolen; but it appeared in evidence that every party whose name was mentioned in the whole course of the

---

Dutchess County Mutual Insurance Co. agt. Hachfield.

---

trial knew, at the very instant when the bonds came to their notice, that they were stolen bonds. Stoker, Taylor & Co., Hachfield's bankers, who merely received the bonds on deposit, spoke of it immediately, without their attention being called to the bonds. Guest knew it the moment the bonds were offered to him, and at once communicated with the plaintiff, though he had had no previous communication with the company. And he remembered even the number of one of the bonds. It is plain from the testimony of Rudd, who bid for them, that he knew they were stolen.

Hachfield then made no offer for them until he himself got a bid for them. He then went to Kendrick and purchased them at ninety-six. He did not ask the name of the party who sold them through Kendrick, but told Kendrick to be sure of his party, to be sure "that he was responsible."

Hachfield could not show in all his books an entry of any kind that showed the party from whom he took the bonds or to whom he sold them, and the letter in which he first offered them to Rudd, at Poughkeepsie, is missing. The bonds were an unusual bond, and were drawn in an unusual manner, being made, not payable "to bearer" but to "executors, administrators or assigns," with the name of the payee left blank.

Hachfield did, indeed, when his bankers sent him word that the bonds were stolen, telegraph to Poughkeepsie about them. But he did not telegraph to either the insurance company or to the financial officers of the city of Poughkeepsie, from whom he would have got his information immediately, but who would also have been likely to take steps to recover the bonds, if they were stolen. Nor did he telegraph that he had the bonds. He telegraphed to one Davis, asking him to "write immediately whether numbers forty-six to fifty, \* \* \* *are stolen bonds,*" meaning to act according to the information received in reply.

The jury, under the judge's charge, gave a verdict for the plaintiff.



---

Dutchess County Mutual Insurance Co. agt. Hachfield.

---

The defendant excepted to the refusal of the presiding justice to dismiss the complaint, at the close of plaintiff's case.

The defendants also took certain exceptions to the rulings on evidence, and two exceptions to refusals of the presiding justice to charge according to certain requests.

No exception was taken to any portion of the charge as actually given.

The defendants also moved to set aside the verdict and for a new trial, on the ground that the verdict was against the weight of evidence. To the denial of this motion the defendants excepted.

I. The verdict is not against the weight of evidence.

The court will not disturb the verdict, unless it is perfectly clear, beyond a doubt, that the weight of the evidence is against the verdict.

Of course, in any case of this kind, the parties receiving stolen bonds invariably testify, on their oath, that they had no knowledge or suspicion that the bonds were stolen.

Sometimes, however, as in the present case, the jury do not believe that testimony. And the jury had a constitutional right not to believe it.

The simple fact that the defendants could show, in their books, no entry of any kind by which these bonds could be traced to the party from whom they bought, was, of itself, almost enough to make the jury disbelieve Hachfield's testimony, and be convinced of his *mala fides*. Every honest broker keeps accounts by which he can trace every bond and certificate of stock to the party from whom he buys and to whom he sells.

The defendants produced what was, in fact, nothing more than a cash book, and a cash book with very scanty entries. Kendrick's name does not appear there.

In addition to this ground of suspicion there were many others; the previous stolen bond transaction with the same parties, vendor and vendee; the peculiar mode of dealing; the strange manner of the negotiations. Moreover, the jury

---

Dutchess County Mutual Insurance Co. agt. Hachfield.

---

gather from the manner of the witness whether or not he be an honest man and is telling the truth.

If the presiding judge at the time of the trial, who heard and saw all the witnesses, and the arguments of counsel, refused to set aside the verdict, most assuredly the appellate court will refuse to do so, having none of those means of judging of the correctness of the jury's conclusion.

All the circumstances of the case, both for and against the defendants, were submitted to the jury, with the utmost fairness toward the defendants, on the part of the learned justice who tried the cause.

Of course, the case against the defendants is circumstantial and one of inference. The inference is, however, to be drawn entirely from the defendants' own statements and acts, and they cannot complain.

And the point of good or bad faith is one especially belonging to a jury to determine, and the court will not, on such a point, disturb the finding.

II. The refusal to dismiss the complaint, on the plaintiffs' testimony, was too clearly right to be questioned for an instant.

The only facts at that point proved were the plaintiffs' ownership of the bonds and the robbery.

The defendant stated as his ground for the motion, that the defendants "purchased these bonds in open market, in good faith, and for a fair market value."

As to the circumstances of the purchase, there was then no evidence whatever in the case. The plaintiff's witness, on cross-examination, testified that Hachfield had made certain statements to him on these points. But there was no evidence on the points.

III. The only exceptions taken were to two refusals to charge as requested.

IV. The first of these two exceptions is as follows:

The defendants' counsel requested the following charge:

"That if the defendants paid full value for these bonds

---

Dutchess County Mutual Insurance Co. agt. Hachfield.

---

without notice, the presumption is that they purchased them in good faith, and that the burden rests upon the plaintiffs to show the absence of good faith." The court refused to charge otherwise on this point than had been charged.

The law is, on this point, that when bonds negotiable by delivery are proved to have been stolen, then the burden of proof is on the purchaser to show that he purchased, first, for value, and, second, in good faith.

This burden of proof does not shift from one party to the other at any time during the trial. The question of fact in this case is solely one of good faith (there being no question on the point of value), one which the jury are to determine on all the circumstances. The burden of proof remains on the defendant throughout, being in possession of stolen property, to show good faith. The evidence may be so strong in favor of the purchaser that the court is bound to direct a verdict in his favor. But otherwise the purchaser is bound to satisfy the jury, on all the facts of the case, that he purchased in good faith.

In the charge as given, the court repeatedly instructed the jury that the question was one solely of good faith; that this one circumstance was to be taken into consideration, with others, in determining this question of good faith, and that it was a very strong circumstance.

The law has always been laid down in the case of stolen bonds that the purchaser must show two points:

(1.) That he purchased for value, and (2.) That he purchased in good faith. "The party in possession of a negotiable instrument is *prima facie* the owner of it; but as soon as it is shown to have been lost or stolen from the true owner, the presumption is changed, and he must then show, *not only, what consideration he gave for it, but also that he took the paper in good faith* in the ordinary course of business; *after that*, the party resisting payment may undoubtedly reply, impeaching the good faith of the transaction; which he may do by either direct or circumstantial evidence, that the plain-



---

Dutchess County Mutual Insurance Co. agt. Hachfield.

---

tiff acted in bad faith in taking the bill" (*Edwards on Bills*, 310).

See, too, *Stalker* agt. *McDonald* (2 *Hill*, 101), citing the language of lord MANSFIELD from *Miller* agt. *Race*, the leading case on the point: "And the words 'for a valuable consideration' as well as 'bona fide paid to him,' are italicized in the opinion of lord MANSFIELD, to show that *both are material and necessary* to protect the holder of a note against the claim of the former owner thereof" (*See, also, Steinhart* agt. *Boker*, 34 *Barb.*, 442; *Lord* agt. *Wilkinson*, 56 *Barb.*, 594; *Fulton Bank* agt. *Phoenix Bank*, 1 *Hall*, 562; *Chitty on Bills*, 255-260; 3 *Phillips' Ev.*, 159-162; *id.*, 820).

There are certain cases which say, in general terms, that when the holder of negotiable paper has once shown himself to be a holder for value, then the *onus* is on the other party to prove *mala fides*.

This is the law as to negotiable paper which has been obtained without consideration, or by fraud.

But the law is otherwise as to notes or bonds that have been stolen. In the case of securities that have been stolen, the holder is compelled to show not only a holding for value, but also *bona fides*.

V. The request was clearly too broad.

The court very properly ruled that it was for the jury alone to say how "close and critical" examination the defendants were bound to make.

The court in fact charged, in effect, that under certain circumstances no examination at all need have been made. "If you find from the evidence and surrounding circumstances that Hachfield & Co. bought these bonds in good faith, without any reason to suppose that Kendrick had wrongfully come into possession of them, *then they are protected*," *i. e.*, whether or not they made *any examination*.

"I again say, in conclusion, that it is a *mere question of good faith*. If you find that Hachfield & Co. acted in good faith, bought these bonds in good faith, they are to be protected."

---

Dutchess County Mutual Insurance Co. agt. Hachfield.

---

This is the whole law on the point. Every special circumstance is to go to the jury for what it is worth.

The judgment should be affirmed, with costs.

DANIELS, J.—This action was brought to recover the possession of five bonds, issued by the city of Poughkeepsie, for the sum of \$1,000 each. They were payable in blank, with the addition, following the blank, of the terms “his executors, administrators or assigns,” &c.; and these terms, following the space left for the insertion of the name of the payee or holder, were sufficient to render them negotiable under the mercantile law of the state as it now seems to be settled (*Brainard agt. N. Y. and Harlem R. R. Co.*, 25 *N. Y.*, 496; *White agt. Vermont and Mass. R. R. Co.*, 21 *How. [U. S.]*, 575; *Michigan Bank agt. Eldred*, 9 *Wallace*, 544, 551, 552).

The evidence showed that these bonds had been feloniously stolen from the plaintiff, their lawful owner, shortly before they were purchased by the defendants, and that imposed the obligation upon them of proving to the satisfaction of the jury that their purchase was made for value, and in good faith, before they could establish a title to the bonds superior to that of the plaintiff, as the preceding owner (*Farmers' Bank agt. Noxon*, 45 *N. Y.*, 762).

Where fraud or illegality in the negotiation of commercial paper is shown, the law presumes a want of consideration in the transfer. It supposes that “the original party, not being able to sue upon the instrument himself, has handed it over to another to sue upon it for his benefit. This presumption, so raised by the law, must be rebutted by the holder showing affirmatively that he gave value. It is not quite correct to say that the *onus* of proving value is cast upon the plaintiff; but the plaintiff, being presumed to stand in the shoes of the party from whom he took the instrument, and to be his agent for the purpose of carrying out the fraudulent or illegal

---

Dutchess County Mutual Insurance Co. agt. Hachfield.

---

intention, is bound to get rid of that presumption" (*Fitch agt. Jones*, 32 *Eng. Law and Equity*, 134, 137, 138).

Proof was given by the defendants tending to overcome the presumption arising out of the circumstance that the stolen bonds were found in their possession, by showing that they were purchased by them for a valuable and adequate consideration, without notice of any infirmity in the title of their vendor; and it is upon the disposition which the court made, at the trial, of the questions arising upon this proof that the main effort is made by the defendants' counsel to sustain their present appeal. After the charge had been delivered to the jury, the defendants' counsel requested the court to instruct them that if "Hachfield & Co. purchased these bonds in the open market for full value, and in the usual course of business, without notice or suspicion, they were not bound to make a close and critical examination in order to escape the imputation of bad faith in the purchase." The court declined to charge this proposition, and left it to the jury to say how much of an examination they were to make; and the defendants excepted to the refusal. This exception is the only one required to be considered in connection with the charge of the court, because the preceding request, though in the main correct, was finally coupled with an untenable proposition, and for that reason properly refused.

The proposition presented by this exception seems to be faultless. For if the defendants did, as it contemplated, purchase the bonds in the open market for value, in the usual course of business, without notice or suspicion, then they were not bound to make either a close or critical examination, either of the bonds or into their history, in order to escape the imputation of bad faith in the purchase. The terms made use of did not complete or finish the idea pointed at by the words "notice or suspicion." But as the whole controversy hinged upon the question whether the defendants' purchase was made in good faith, what was really intended by their use was clear and conspicuous. It was, in substance, without



---

Dutchess County Mutual Insurance Co. agt. Hachfield.

---

notice or suspicion of the robbery by which the plaintiff was divested of their possession. That was, under the circumstances, their clear implication, and with that construction the proposition which the court declined to charge was sound in all respects; for it presented the case of a purchase for full value, in the ordinary course of business, without notice or suspicion of the robbery creating the infirmity of title; and that was all which the law required to be established to protect the defendants as the owners of the bonds. Under those circumstances, if they had been submitted to, and found as proved, by the jury, the defendants were not bound to make any examination or investigation whatever to escape the imputation of bad faith in their purchase of the bonds. For they were of themselves sufficient to show a purchase in good faith for value and in the usual course of business; and the law requires no more than that in order to vest the buyer with the title to negotiable securities (*Welch agt. Sage*, 47 *N. Y.*, 143; *Belmont Branch of State Bank of Ohio agt. Hoge*, 35 *N. Y.*, 65).

There was nothing in the charge which avoided the effect of the refusal to submit this proposition to the jury. That was still more unfavorable to defendants' title, for it required them to satisfy the jury that the bonds were purchased by them in the ordinary course of business, "and that they did not procure them in such a shape as would put a prudent man upon inquiry;" and that "they bought them and paid for them without reason to suppose that there was anything wrong about them."

"That where parties *act in good faith* in the purchase of securities in the open market, without any attending circumstances which would call for inquiry or put a party upon his guard, the purchaser would be protected," &c. And it was further added, "if you find from the evidence and the surrounding circumstances that Hachfield & Co. bought these bonds in good faith, without any reason to suppose that Kendrick had wrongfully come into possession of them, then

---

Dutchess County Mutual Insurance Co. agt. Hachfield.

---

they are protected." These were the prominent portions of the charge, stating what the defendants were required to establish in order to succeed in their defense. And they required too much of them, because it was clearly to be implied from them that a purchase for value and in good faith was insufficient in case there was enough shown to put the defendants upon inquiry, or upon their guard, or arouse their suspicions that the seller had wrongfully acquired possession of the bonds.

While all that the law required to protect the purchaser is that the purchase shall be for value, in good faith, and in the ordinary course of trade (*Welch agt. Sage, supra*; *Goodman agt. Simonds*, 20 *How.* [U. S.], 343).

And these propositions were not corrected by the general statement afterwards made that the defendants were to be protected if they bought the bonds in good faith, because the preceding qualifications of the general proposition were in no sense withdrawn or restricted. The jury were left with the impression conveyed by the charge, that, in addition to good faith in the purchase and value paid for the securities, the defendants were bound to satisfy them that it was made under circumstances that would not put a prudent man upon inquiry, or cause him to suppose there was anything wrong, or put them upon their guard, or lead them to suppose that the bonds were not regular.

To correct these qualifications, at least the proposition the court declined to charge was required, and its refusal must have been decisive with the jury, that a purchase for value, in good faith and in the usual course of business, was not in itself sufficient for the protection of the defendants.

A new trial cannot be ordered for misdirection in the charge, for the simple reason that it is not one of the grounds which, under the Code, can be considered in support of a motion made for that purpose upon the minutes of the court (*Code*, § 264). For that reason the effects of these directions are not otherwise before the court on the present appeal,

---

Dutchess County Mutual Insurance Co. agt. Hachfield.

---

than they are appropriate for consideration upon the effect of the refusal to charge as requested by the defendants. In that respect they have been examined to show that the proposition declined was not included in anything which had been said; and as it had not previously been submitted to the jury, and was right and proper for their consideration, the court should have charged it when the request was made. The refusal to do so was error, and for that reason the judgment should be reversed, and a new trial ordered, with costs to abide the event.



---

Livermore agt. Bainbridge.

---

## SUPREME COURT.

CHARLES F. LIVERMORE and others, respondents, agt. HENRY BAINBRIDGE and another, executors, &c., appellants.

*Misconduct of referee — report set aside for irregularity.*

Where a referee, after the cause has been tried by him, summed up and submitted to him for decision, approaches the party (plaintiff) against whom judgment is finally rendered, suggesting a proposed sum "as having been discussed or spoken of" by his antagonist's counsel, with the intimation that "there were matters in evidence in the case which led him to believe that, if he did give judgment for the defendants, it would necessarily be for a large amount," and that "it might be well to think the matter over in that light, and perhaps it might be for their interest to settle it;" it is the duty of the court to interfere and set aside the report of the referee for such irregularity. (*This decision affirms that rendered at special term, FANCHER, J., 44 How. Pr. R., 357.*)

*New York, General Term, January, 1874.*

*Before DAVIS, P. J., DANIELS and DONOHUE, JJ.*

APPEAL from order of special term setting aside report of referee and vacating judgment, &c.

*Mr. Sewell, for appellants.*

*Mr. Pierrepont, for respondents.*

DAVIS, P. J.—It seems quite apparent from the affidavit of the referee in this case that the conversation with Mr. Clews, of which he speaks, must have taken place after the cause had been summed up and submitted to him for decision. He says that he said, in substance, to Mr. Clews, "that he

---

Livermore agt. Bainbridge.

---

(the referee) had not at all come to any conclusion about the case as yet, but that there were matters in evidence in the case which led him to believe that if he did give judgment for the defendants it would necessarily be for a large amount." It is not at all likely that an intelligent referee would have thus spoken of the probable or possible conclusion and judgment to which he had not "as yet" arrived, upon the matters in evidence before him, until after the case had been submitted for his final consideration. Mr. Clews testifies to two interviews between the referee and himself, in one of which the sum of \$35,000 was suggested as a proper amount to be paid by plaintiffs. He says that the second interview was after the cause had been summed up, but he is uncertain at which interview the amount he names was mentioned. The referee states that on the occasion when he recollects to have called on Mr. Clews he "has some recollection of mentioning some sum as having been discussed or spoken of by defendants' counsel, or some of them, and he thinks that sum was \$35,000." Collating the affidavits of these gentlemen on this point together, I think there is no difficulty in concluding that the conversation narrated by the referee in fact took place after the case was finally submitted to him. This fact completely answers the objection that the plaintiffs should have moved sooner for the alleged misconduct of the referee. They took no step in the progress of the case which can be asserted as a waiver, for at that stage there was no opportunity to take any; and the first occasion when a charge of laches could have arisen against them is the one when they make this motion, and thereby of course repel all idea of acquiescence. It was suggested by the counsel for the appellant on the argument that the alleged irregularity arising from the conduct of the referee was not sufficiently pointed out in the notice of motion. But the allegations on which it is based are contained in plaintiffs' affidavits, and are sought to be distinctly met by the affidavits on the part of the defendants. We must assume, therefore, that this point of

---

Livermore agt. Bainbridge.

---

formality was not made in the court below, because, under the circumstances, that court would doubtless have allowed the motion to have stood over for an amendment of the notice, or at most have denied it without prejudice. We do not feel ourselves bound to entertain such an objection when it is apparent that the motion was discussed and decided in the court below as though the notice was strictly regular and sufficient.

The question, therefore, on this branch of the motion is, substantially, whether the court ought to interfere to set aside the report of a referee who, after the case is submitted to him for decision, approaches the party against whom judgment is finally rendered, in the manner and for the purpose shown by the affidavit of the referee himself in this case. This question is quite fully discussed in the opinion of FANCHER, J., at special term, and to his views and conclusion thereon we do not hesitate to give our hearty assent. It may be commendable in a referee or court, in the presence of both parties, to recommend and urge a settlement between themselves of their litigation, but for an officer occupying, as to the questions of fact in a cause, the position of jury, to be the bearer to the party afterwards heavily beaten by him of a proposed sum "as having been discussed or spoken of" by his antagonist's counsel, with the intimation that "there were matters in evidence in the case which led him to believe that, if he did give judgment for defendants, it would necessarily be for a large amount," and that "it might be well to think the matter over in that light, and perhaps it might be for their interest to settle it," is to assume a relation different from that which our duty enjoins. It is not difficult to see that the weak human nature of some referees might lead them, by their subsequent judgment, to show the party who had rejected such friendly overtures, the folly of not heeding salutary advice; and since some might fall into such a temptation, the rule should be inflexible that permits none to tread the path that leads to it.



---

Livermore agt. Bainbridge.

---

We think it improbable that the referee in this case was affected by the mistake he made, but the interests of justice demand that general rules designed to prevent the suspicion of impurity in its administration should be rigidly adhered to. For these reasons we think the order appealed from should be affirmed.

It is questionable whether the order of a referee amending pleadings in the course of a trial can be reviewed by a motion at a special term to set aside his report, or because, after such amendment is granted, the parties fail to put the pleadings in proper form. But it is not necessary to pass upon these questions. We prefer to put our decision distinctly upon the ground already considered.

Order affirmed with costs.

DANIELS and DONOHUE, JJ., concur.

---

 Livermore agt. Bainbridge.
 

---

### COURT OF APPEALS.

CHARLES F. LIVERMORE *et al.*, respondents, agt. HENRY BAINBRIDGE *et al.*, Exrs., &c., appellants.

*Dismissal of appeal—misconduct of the referee—discretion of court below.*

This court will not entertain an appeal from an order of the general term, affirming an order of the special term setting aside a judgment entered on the report of a referee, for his alleged misconduct, and granting a new trial.

The appeal will be dismissed on the ground that the motion was one addressed to the discretion of the judge at special term, and that no appeal in such a case lies to this court from the order of the general term, reviewing the exercise of that discretion.

If the judge in the first instance decides wrongly, the general term can correct him. But there the right of review ends. This court possesses prescribed and limited powers, and its jurisdiction does not extend to review orders resting in discretion.

*May, 1874.*

APPEAL from an order of the general term of the first judicial district, affirming an order setting aside a judgment entered on the report of a referee, for his alleged misconduct.

*Mr. Sewell*, for appellants.

*Mr. Pierrepont*, for respondent.

ANDREWS, *J.*—In the case of *Gray* agt. *Fiske*, recently decided in this court, but not yet reported, in which an appeal was taken from the order of the general term of the superior court affirming an order of the special term, denying a motion to set aside a judgment entered on the report of a referee upon allegations of misconduct on his part, the

Followed 48 How  
122-124  
H 706. 546-580

---

Livermore agt. Bainbridge.

---

appeal was dismissed on the ground that the motion was one addressed to the discretion of the judge at special term, and that no appeal in such a case lies to this court from the order of the general term, reviewing the exercise of that discretion.

The right of the general term to review an order of a special term, made upon a summary application in an action after judgment, when it affects a substantial right, is given by section 349 of the Code, and the jurisdiction of the general term under this section to review orders by the special term, in respect to matters resting in the discretion of the court, which involve substantial rights and interests, has been constantly exercised, and has been sanctioned and approved by this court (*People agt. N. Y. C. R. R. Co.*, 29 *N. Y.*, 418). This jurisdiction is convenient, and is, indeed, essential to the proper administration of justice. The orders which come under the designation of discretionary orders frequently involve important rights, and the order in this case is one of that character. The effect of the order is to deprive the defendant of a judgment in his favor, obtained after a trial before the referee, upon controverted questions of fact, and he is remitted to a new trial, with the hazard of a less favorable result. It would be unsafe and dangerous to conclude litigants in such a case, by the order of the special term, without the power to apply to an appellate tribunal to correct any error or inadvertence into which the judge at special term may have fallen in the exercise of the discretion. But this court has steadily disclaimed the right to review, by appeal, orders of the general term made upon appeal from a special term in matters resting in discretion. The rights of parties in orders of that character are not defined and established by fixed legal principles or by settled rules of equity. Each case must depend, in a great measure, upon its own peculiar circumstance, and this court declines to entertain jurisdiction to review discretionary orders as inconsistent with the constitution of the court and its character as a tribunal in which questions of law only are to be considered, save in the



---

Livermore agt. Bainbridge.

---

excepted cases, within which orders of this kind are not embraced (*Howell agt. Mills, decided in September, 1873*). In *Howell agt. Mills*, this court entertained an appeal from an order of the general term, affirming an order of the special term, denying a resale in a partition case, on the application of an infant who had been defrauded of his interest in the premises to which the proceedings related, by a collusive arrangement between the other parties at the sale. The application to the special term was not, in a just or proper sense, addressed to the discretion of the court. The infant, upon the facts shown, was entitled by well-settled rules of law, to the relief asked, and upon this ground the court reversed the order appealed from. This decision does not disturb the general rule that an appeal does not lie to this court from discretionary orders.

The appeal here is from the order of the general term, affirming an order of the special term setting aside the judgment entered on the report of a referee, for his alleged misconduct, and granting a new trial.

We are of opinion that *Gray agt. Fiske* is a decisive authority against the right of the appellant to maintain this appeal. The supervisory power of the supreme court over the conduct of referees, and its jurisdiction to set aside judgments for misconduct on their part during progress of the cause, was distinctly asserted in that case, and the court declared that the same rules should be applied as were adopted by courts in applications to set aside a verdict for the misconduct of jurors. This view has been taken by the supreme court in several cases (4 *How. Pr. R.*, 253-9; *Id.*, 1, 7, 12; *Id.*, 297). It is strenuously insisted by the counsel for the appellant that no misconduct on the part of the referee was disclosed in the motion papers on which the order of the special term was granted, and we have not been able to discover anything in his conduct inconsistent with fairness or integrity, or which, under the circumstances, calls for criticism. Both the special and general term exonerate the

---

Livermore agt. Bainbridge.

---

referee from any imputation of improper motives in endeavoring, as he did, to bring about a settlement, and suggesting, as reasons for it, the same considerations which had been openly and freely spoken of between the parties or their attorneys, in the presence of the referee; and the order was granted by the special term and affirmed by the general term upon the ground that the referee may, though unconsciously, have been influenced in his subsequent action by the fact that his suggestions as to the settlement had been disregarded by the plaintiffs.

It does not aid the appellant to show that the order was not justified by the facts upon which it was based, or that the discretion of the court below in the particular case was improvidently exercised. It is not sufficient to show that injustice has been done, but it must appear that it was done under the circumstances which authorize this court to interfere. The affidavits brought to the attention of the court a circumstance upon which the claim of misconduct was made.

The judge at special term was called upon to decide in respect to it. From the nature of the case, what is misconduct on the part of a jury or referee, and what facts establish it, are inquiries which cannot ordinarily be determined by the application of exact rules of law, and the decision must be left mainly to the good sense and sound judgment of the judge before whom the inquiry is originally prosecuted. Different minds may reach different conclusions upon the same facts, and it is not to be supposed that a judge, under the guise of discretion, will seek to do injustice.

If the judge in the first instance decides wrongly, the general term can correct him. But there the right of review ends. This court possesses prescribed and limited powers, and its jurisdiction does not extend to review orders resting in discretion.

The appeal should be dismissed.

ANDREWS, J., reads for dismissal of appeal, with costs.

All concur.

---

Reid agt. Bank of New York National Banking Association.

---

## NEW YORK COMMON PLEAS.

JAMES REID, Administrator, &c., agt. THE BANK OF NEW YORK NATIONAL BANKING ASSOCIATION.

*Demurrer — to answer — power of attorney.*

Where an answer sets up a power of attorney authorizing the attorney to do and perform all necessary acts in and about the management of the business of the principal as an importer of wines and liquors, with full power and authority in the premises, followed by an averment that the principal left the attorney in full and complete charge and control of his business, with directions to continue and carry on the same during the principal's absence:

*Held*, that this fact, if proved, showed an intention to confer something more than a mere naked power upon the attorney. He could make and thus be compelled to meet business engagements. There being no fraud or mismanagement on his part, he should be protected for acts done in good faith and without knowledge of the revocation of the authority (by death) under which he acted.

*Special Term, April, 1874.*

*Before LARREMORE, J.*

LARREMORE, J.—The answer sets up a power of attorney authorizing Austrup (*inter alia*) to do and perform all necessary acts in and about the management of the business of Welsh as an importer of wines and liquors, with full power and authority in the premises.

This is followed by the averment that Welsh left Austrup in full and complete charge and control of his said business, with directions to continue and carry on the same in the absence of Welsh.



---

Reid agt. Bank of New York National Banking Association.

---

If this fact be established by proof, it clearly shows an intention to confer something more than a mere naked power upon the attorney. The latter was thus charged with a responsibility which, from the very nature of the case, coupled the power confided to him with an interest in the control and management of said business. He could make and thus be compelled to meet business engagements and liabilities. For this purpose the absolute control and disposition of the moneys of his principal at all times during his absence was a necessity. The whole transaction shows upon its face an intention to modify the rigor of the rule of law here sought to be applied.

The moneys accruing from said business, after the death of Welsh, and before Austrup had notice thereof, were in the nature of trust funds in his hands, and were properly applied by him to the purposes indicated in the power of his appointment.

There is no imputation of fraud or mismanagement on his part, and he (and those dealing with him) should be protected for acts done in good faith and without knowledge of the revocation of the authority under which he acted.

For these reasons the demurrer (being general to the whole answer) should be overruled.

---

McGuire agt. Sinclair.

---

## NEW YORK SUPERIOR COURT.

JOHN MCGUIRE agt. JOHN SINCLAIR and others.

*Conflict of evidence — question of fact — submission to jury — bona fide holder — promissory note.*

Where conflicting evidence on the trial is given on a question of fact, which it would be error to refuse to submit to the jury on a proper request to the court, the party omitting to make such request cannot take the objection on the hearing of the exceptions that the case should have gone to the jury upon that or upon any other question of fact there might be in the case.

The court will therefore decide the question of fact (a *bona fide* holder of commercial paper for value) on the weight of evidence given on the trial. Where application was made to the plaintiff by one G. for a loan of money, and the plaintiff instead of the money gave G. a promissory note of another party, which he held, to get discounted at G.'s bank for the benefit of G., and G. without getting it discounted turned it out to the defendants, his creditors, before maturity, in part payment to them of an antecedent debt due from G., *held*, that the defendants were *bona fide* holders of the note for value.

*General Term, June, 1872.*

*Before MONELL, CURTIS and SEDGWICK, JJ.*

THIS action was tried before Mr. justice FREEDMAN and a jury on the 19th of February, 1872, and the plaintiff's complaint was dismissed.

The court ordered the plaintiff's exceptions to be heard in the first instance at general term.

*Hamilton Odell, for plaintiff.*

The plaintiff was the owner of a note for \$1,200, made by Enoch Morgan's Sons, dated the 17th day of November, 1870,

---

McGuire agt. Sinclair.

---

and payable to the plaintiff's order in three months. Grant & Ascough were merchants, doing business in New York city. On or about November the twenty-second, Mr. E. B. Grant, one of the firm, applied to the plaintiff for a loan of money. The application resulted in the delivery to Grant of the note in question (indorsed in blank by plaintiff), upon his (Grant's) undertaking to have it discounted at his bank for the plaintiff—it being understood that, when discounted, the plaintiff would loan Grant & Ascough a portion of its proceeds. At this time Grant & Ascough were indebted to the defendants in a considerable sum, and Grant, having obtained possession of the note for the purpose above mentioned, at once transferred it to the defendants on account of such indebtedness, either as "security" or "instead of so much money." On December sixth, as soon as the plaintiff discovered what disposition had been made of the note, he notified defendants of his ownership thereof, and demanded its return; but defendants refused to deliver it up, and they subsequently transferred it to other parties.

The plaintiff received no value or consideration for the note from any party.

The complaint was dismissed by justice FREEDMAN, on the ground that there was no proof of a conversion of the note by the defendants.

*First.* Grant had no interest nor property in the note; it was intrusted to him for a special purpose; his transfer of it to the defendants was a fraud upon the plaintiff.

The defendants, therefore, were not entitled to retain it without proof by them that they were *bona fide* holders (*Bank of Cortland* agt. *Green*, 43 N. Y., 298; *Farmers' Bank* agt. *Noxon*, 45 N. Y., 762).

To constitute them *bona fide* holders they must have received it before maturity, and for value, and without notice of the plaintiff's title (*Small* agt. *Smith*, 1 Denio, 586; *Lawrence* agt. *Clark*, 36 N. Y., 128).

It is admitted that they did receive it before maturity, and



---

McGuire agt. Sinclair.

---

without notice; so that the question in the case is, whether they were holders for value.

*Second.* The defendant, John Sinclair, was examined as a witness before trial. On his direct examination he testified, without qualification, that the note was delivered to defendants "*as security*" for money due to them from Grant & Ascough. A week later, at the close of his examination, being asked by his own counsel to explain his testimony upon this point, he said, "They gave it to us as so much money and we accepted it as such."

A man's declarations are always taken most strongly against himself; but even if this latter statement of the witness stood alone, and not in apparent opposition to his former one, it would fail to prove, what counsel claims for it, a partial payment of the precedent debt due from Grant & Ascough. It falls far short of proving an agreement by defendants to discharge Grant & Ascough's indebtedness *pro tanto*, and to look exclusively to the parties to the note for payment.

*Third.* It will not be claimed that, if the note was taken as security, the defendants were holders for value (*Fenby* agt. *Prichard*, 2 *Sand.*, 154; *White* agt. *Springfield Bank*, 3 *id.*, 222; *Stalker* agt. *McDonald*, 6 *Hill*, 93).

Neither were they, we say, if it was taken in part payment of the antecedent debt (*Harrington* agt. *Dorr*, 3 *Robt.*, 282; *Chesebrough* agt. *Wright*, 41 *Barb.*, 28; *Coleman* agt. *Lansing*, 4 *Lans.*, 71; *Schepp* agt. *Carpenter*, 49 *Barb.*, 542; *Lawrence* agt. *Clark*, 36 *N. Y.*, 128; *McBride* agt. *Farmers' Bank*, 26 *id.*, 454; *Lenheim* agt. *Wilmerding*, 55 *Pa.*, 73).

To constitute a *bona fide* holding of a note fraudulently diverted, as in this case, there must be a parting with value, a surrender of security, an extinguishment of a right, an incurring of liability, at the time the note is received and upon the faith of it; the holder must have done something to his own prejudice in consideration of the transfer of the note to him. It is then immaterial whether he receives it in payment of,

---

McGuire agt. Sinclair.

---

or as security for a precedent debt. All the cases agree upon this point (*Bank of New York* agt. *Vanderhorst*, 32 *N. Y.*, 553 [affirming *S. C.*, 1 *Robt.*, 216]; *Park Bank* agt. *Watson*, 42 *N. Y.*, 490; *Chrysler* agt. *Renois*, 43 *N. Y.*, 209; *Farmers' Bank* agt. *Noxon*, 45 *N. Y.*, 762; *Brown* agt. *Leavitt*, 31 *N. Y.*, 114; *Pratt* agt. *Coman*, 37 *N. Y.*, 440; *Essex County Bank* agt. *Russell*, 29 *N. Y.*, 673; *Young* agt. *Lee*, 12 *N. Y.*, 551; *Montrose* agt. *Clark*, 2 *Sand.*, 117; *Webster* agt. *Van Steenburgh*, 46 *Barb.*, 212).

Here the defendants "relinquished no security or right on the faith of the note, nor did they part with anything or incur any risk in obtaining it" (*Lawrence* agt. *Clark*, 36 *N. Y.*, 130; and see *American Exchange Bank* agt. *Corliss*, 46 *Barb.*, 19).

*Fourth.* Therefore, the refusal of the defendants to surrender the note, and their negotiation of it to other parties after plaintiff's notification and demand, constituted a *conversion*, for which they are liable in this action (*Boyce* agt. *Brockway*, 31 *N. Y.*, 490; *Tolano* agt. *National Co.*, 5 *Robt.*, 326).

The exception should be sustained and a new trial ordered.

*Edward Patterson*, for defendants.

Prior to the 22d day of November, 1870, the plaintiff was the owner of a certain promissory note made by Enoch Morgan's Sons for \$1,200. About that date he parted with it to a Mr. Grant, of the firm of Grant & Ascough, by indorsing it in the usual way. It appears by the plaintiff's testimony that Grant wanted to borrow money of him and applied to him for a loan. That plaintiff handed Grant this note, intending him to use it, that he might procure it to be discounted in his bank, and from the proceeds of the discount the plaintiff intended to loan Grant money.

Grant took the note, and on the 22d day of November, 1870, transferred it to the defendants. On that day there became and was due from Grant's firm to the defendants the

---

McGuire agt. Sinclair.

---

sum of \$2,787.50. The note was given by Grant to the defendants in lieu of so much money and was by them accepted as money.

The defendants were *bona fide* holders for value before maturity and without notice.

The plaintiff brings trover against the defendants, the indorsees of Grant & Ascough, for the alleged conversion of the note by the defendants, on the theory that Grant diverted the note from the purposes to which the plaintiff intended it to be applied, and that the note is tainted with this faultiness in the hands of the defendants. A demand and refusal, &c., is also alleged,

The answer, besides a general traverse, avers the rights of the defendants to the note as innocent holders, and sets out the circumstances attending their obtaining it.

The learned justice at the trial dismissed the complaint, the plaintiff's exception to be heard in the first instance at the general term.

I. The nonsuit was properly directed, because the plaintiff failed to prove a diversion of the note by Grant or by Grant & Ascough.

The holder of negotiable paper is never obliged to show under what circumstances and for what value he became owner, or in other words to do aught else than rely upon the protection given him by the commercial law, except in cases where the maker or other party sought to be held liable shows that he parted with the specific paper under duress or by some fraud practiced upon him. When this is unequivocally shown, the presumption of innocence is so far rebutted as to raise a contrary presumption that the holder has received the paper as a cover for the wrong-doer, and hence the duty devolves upon the holder of establishing the *fact* that he is an innocent holder (*Case agt. Mechanics' Bkng. Assn.*, 4 *N. Y.*, 166; *First Natl. Bank, &c.*, agt. *Green*, 43 *N. Y.*, 298).

In this case there was no diversion of the note. *It was loaned to Grant*, for the transaction is tantamount to that.



---

McGuire agt. Sinclair.

---

The plaintiff swears that Grant was to have the proceeds of it; and if he so intended, he virtually intended that Grant should have the note itself.

It will be further observed that the plaintiff made title to the note in Grant, with the express design of relinquishing all right to it himself, and without any specific appropriation of the proceeds to any other purpose than Grant's own use. It was in the contemplation, therefore, of the plaintiff actually to part with all right to and control over the note.

In this respect, this case differs from the familiar cases in the books, in which the presumption in favor of an innocent holder is rebutted and he is called upon to show how he became possessed of the paper.

II. The nonsuit was properly ordered, *because the plaintiff had fully shown by the evidence on his side all that the defendant by the most rigid enforcement of the rule could have been called upon to show, viz., that the defendants procured the note before maturity for value and without notice of any alleged equities of the plaintiff.*

John Sinclair, a defendant, and a witness for the plaintiff, testified that he received the note from Grant, 22d November, 1870. That on that day Grant's firm owed the defendants money on account of contracts, and that the note was taken in lieu of the money (*i. e.*, in payment). It is true, he also says that he thinks the note was taken as security; but the examination will show that he used this term unadvisedly, and without apprehending its technical signification, for he explains:

"Q. You say, in your direct examination, that Grant & Ascough gave you this note as a security. Please explain that?"

"A. They gave it to us *instead of so much money*, and we accepted it as such."

It also appears in evidence that defendants never heard of any claim to the note of plaintiff until December 6th, 1870.

---

McGuire agt. Sinclair.

---

It thus appears that two weeks before the plaintiff asserted claim to the note, and before the defendants even were aware of such a claim, they took it as the equivalent and in satisfaction and payment of a sum of money due them on that day by Grant & Ascough, or, in other words, in extinguishment of the debt.

Notwithstanding the discordant authorities upon the subject (by reason of which it may still be regarded, in the abstract, as an open question), it may, for all the purposes of this case, be admitted that taking a note, as an additional or collateral security for a pre-existing debt, does not make a person a holder thereof for value, within the meaning of the law-merchant. The well-known cases of *Coddington agt. Bay*, *Stalker agt. McDonald*, and *McBride agt. Farmers' Bank*, although contrary to the later rulings of courts of other states and of the United States supreme court, are not as yet modified or reversed, and must doubtless be held to be the law of this state.

But the rule evolved from those cases, and above mentioned, has no application here, for the principle is established beyond dispute that *the acceptance of a note or bill by a creditor, in satisfaction of a debt due him, is a negotiation by the debtor for value*. The creditor parts with his right to pursue his original demand, and would be remediless if he could not resort to the note (*Purchase agt. Mattison*, 3 *Bosworth*, 310; *White agt. Springfield Bank*, 2 *Sandf.*, 222; *Works agt. Smith*, 4 *Duer*, 362; *Youngs agt. Lee*, 12 *N. Y.*, 551; *Brown agt. Leavitt*, 31 *N. Y.*, 113; *Bank of Salina agt. Babcock*, 21 *Wend.*, 499).

The case at bar falls within the rule of the cases last cited, and therefore judgment upon the nonsuit should be ordered for the defendant.

MONELL, J.—The only question in this case was whether the defendants were the holders of the note for value.

They obtained it before maturity from persons who had

---

McGuire agt. Sinclair.

---

the lawful custody of it, and without notice that the delivery to them was a diversion from the purpose for which it was given to such persons by the plaintiff; so that, if the defendants gave value for it, their title cannot be disturbed.

The only evidence touching the question was that of one of the defendants. He testified that the defendants received it from Grant & Ascough, who were at the time indebted to the defendants in a much larger amount, and took it in lieu of money. Being asked, "did they give it to you in payment of the moneys due from them, or as security therefor?" he answered, "as security, I should say." Afterward, when asked to explain his answer, that it was given as security, he said, "they gave it to us instead of so much money, and we accepted it as such."

There was, perhaps, sufficient conflict in this evidence to have made it proper for the jury to determine whether the note was taken in part payment of an antecedent debt, or merely as security for its payment; and had a request to submit such question to the jury been refused, it would, I think, have been error.

No such request, however, was made; and the objection cannot be taken now that the case should have gone to the jury, upon that or upon any other question of fact there might be in the case (*O'Neill agt. James*, 43 *N. Y. R.*, 84, 93).

The decision is, therefore, to be made as if the fact was undisputed that the defendants took the note toward payment of the debt of Grant & Ascough. Such a consideration made the defendants *bona fide* holders.

But even if the decision below was made upon the weight of the evidence being in favor of such holding, it would meet with our approval. It is quite clear that the defendants did take the note as payment, and not as a mere security.

The exceptions should be overruled and judgment ordered dismissing the complaint, with costs.

Justices CURTIS and SEDGWICK concur.



---

People *ex rel.* Ford agt. Earle.

---

### NEW YORK COMMON PLEAS.

THE PEOPLE *ex rel.* WILLIAM C. FORD agt. ABRAHAM L.  
EARLE, Auditor, &c.

*Mandamus — assignment of patent — county charge.*

Where the board of supervisors purchase a right to use in the register's office a patented system of indexing the public records, which is a proper county charge, and which they can properly audit as such, they may also purchase and take an assignment of such patent, to secure the county forever from the risk of having to pay over again for the use of such invention, which is also a proper county charge, which they can audit, and which the county will be required to pay.

APPLICATION for peremptory mandamus.

J. F. DALY, *J.*—None of the allegations of the relator's affidavit are denied, the auditor basing his opposition to the mandamus asked for upon the ground that if the claim of the relator, for selling to the county the right to use in the register's office his patented system of indexing the public records, was a legal county charge, for which the board of supervisors might lawfully audit his bill, yet his claim for assigning his patent to the county was not a legal county charge, and the supervisors had no right to make him an allowance for it (1 *R. S.*, 304, 386).

I regard the purchase by the county of the right to use an invention which will greatly facilitate the public business, and be very convenient to the persons examining the public records, to be entirely within its powers, and the purchase-price to be a valid county charge, which the board of supervisors may audit and allow (*Bright agt. Supervisors of Che-*

---

People *ex rel.* Ford agt. Earle.

---

*nango Co.*, 18 *Johns.*, 242; *People ex rel. Hall agt. Board of Supervisors*, 32 *N. Y.*, 473; 1 *R. S.*, 386, § 15).

If the invention be patented, it is necessary, in order to avoid trouble in the future, to have the proper grant or assignment of the right to use it in the county executed and delivered by the owner of the patent. The board of supervisors took a mere common precaution in requiring, before payment, such an assignment to be made. Nothing in the resolution of the board indicates that they were purchasing the *sole* right, or paying any part of the purchase-price for the *sole* right, or doing more than securing the county forever from the risk of having to pay over again for the use of the invention.

The auditor does not show that the sum allowed by the board was too large or that they exceeded their powers in any way. Their audit being final (as has been many times held in this court and in the supreme court), the auditor must allow the vouchers.

Mandamus to issue.

VOL. XLVII

47

---

People *ex rel.* Stockwell agt. Earle.

---

## N. Y. COMMON PLEAS.

THE PEOPLE *ex rel.* LEVI S. STOCKWELL, agt. ABRAHAM L. EARLE, County Auditor.

*Mandamus — variance — no appropriation — lease — fraud.*

A variance between the declaratory and mandatory part of a writ of alternative mandamus is not fatal. It may be amended.

The plea of "no appropriation" is not properly interposed by the county auditor on a proceeding to compel him to audit a claim; that should be reserved for an application to compel its payment.

The power given to the board of supervisors of New York to provide for the permanent location of an armory, by erecting the same, may be fairly construed to authorize the hiring of a building for that purpose for a term of years.

The question of fraud may be raised and investigated whenever it is made to appear, and the audit of the board of supervisors is not conclusive on that point. But a general charge of fraud in the return to a writ of mandamus is insufficient; subject, however, to amendment by setting up specific acts of fraud.

*General Term, May, 1874.*

THE claim of the relator herein was audited and allowed by the board of supervisors on the 8th day of December, 1873, and ordered to be paid by the comptroller; a certified copy of the resolution of the said board, and the necessary voucher thereto attached, were delivered to the respondent on the 10th day of December, 1873.

*E. Delafield Smith*, corporation counsel, for appellant.

*Michael H. Cardozo*, counsel for relator.



---

People *ex rel.* Stockwell agt. Earle.

---

I. The audit and allowance of the relator's claim by the board of supervisors have the force and effect of a judicial determination, and they cannot be questioned in this proceeding on the ground of fraud in the claim itself. Their determination is absolutely conclusive as to the justice and legality of the claim (*People ex rel. Brown agt. Green, supreme court, general term, 1st department, BRADY, J., and authorities there cited, 46 How. P. R., 302; People ex rel. Kinkel agt. Earle, court of common pleas, special term, J. F. DALY, J.; People ex rel. Brown agt. Earle, common pleas, general term, DALY, Ch. J.; People ex rel. Outwater agt. Earle, common pleas, general term, DALY, Ch. J.*).

True, the judgment of the supervisors does not alone entitle the creditor to payment; he must submit his vouchers to the auditor for examination, allowance and approval. The board determines the existence of the indebtedness, and the finance department must see to it that proper vouchers are presented, examined and allowed. The two things are in harmony, and entirely consistent with each other, one relating to the examination and allowance of the claim, the other to its payment on proper vouchers.

The auditor does not sit in judgment upon the demand; his power is not judicial, it is only ministerial.

II. It is no consequence that in the opinion of the auditor and others the rent reserved in this lease is too high. Their views cannot prevail to defeat the judgment of a competent tribunal (*People ex rel. Brown agt. Green, supra*).

Even in an action brought for the express purpose of setting aside this lease, the fact that the rent was excessive would be no evidence of fraud. It would create no such presumption.

III. Immediately upon the execution of the lease in question, the supervisors took possession of the premises therein described, and have ever since been and still are in the occupation of the same.

They have commenced no proceedings to set aside the lease

---

People *ex rel.* Stockwell agt. Earle.

---

for fraud in its inception, nor to cancel it for any other reason whatsoever. They are, therefore, concluded, for having remained in possession under the lease; they are bound to pay the rent reserved therein; they cannot hold the lease and refuse to pay the rent.

IV. The fact that the respondent alleges that there are no funds applicable to the payment of the relator's claim is no answer to this application to compel the auditor to audit a voucher. It only becomes material when a proceeding to compel payment is instituted against the comptroller (*People ex rel. Martin agt. Earle, FANCHER, J.*; *People ex rel. Miller agt. Earle, MONELL, Ch. J.*, 46 *How. Pr. R.*, 367).

V. There can be no doubt but that the board of supervisors had a perfect right to authorize the execution of the lease in question. And the expense incurred thereby is by express legislative enactment made a county charge (*Laws of 1862, chap. 477, §§ 119, 120*).

VI. Though the rules of common-law pleading are still in force as to the law of mandamus, and though the rule, that he who makes the first mistake must fail, be true, it must nevertheless be recollected that this is so but to a limited extent; for, by section 471 of the Code of Procedure, full and plenary power is conferred upon the court wherein the matter is pending of allowing "amendments of any mistakes in process, pleadings or proceedings" relative to mandamus, and that "they shall be made in conformity to the provisions of chapter 6, title 6 (§§ 169, 177), of the second part of the Code of Procedure" (*Code, § 471*).

Therefore, if there be any technical defect in the writ of alternative mandamus, as was suggested concerning the use of the word "claim" in the commanding part of the said writ, and the word "voucher" in the declaratory part thereof, the right and duty of the court to allow any amendment that may be found necessary, and this, too, after a full hearing on the merits, no surprise being suggested, cannot be questioned.

---

People *ex rel.* Stockwell agt. Earle.

---

VII. Again, the declaratory or narrative portion of the writ shows that the "necessary" voucher was presented to the respondent, and it was suggested that the form of the voucher, and its specific details, should have been shown.

But the fallacy of this argument must be apparent, for the word "necessary" certainly includes proper, and even more, and indeed it is not suggested in the return made by the respondent that the voucher was not correct in form and substance. If it was incorrect, the court should have been informed of that fact by the respondent, for certainly the relator's pleading threw the burden on him to do so. And the court should not be asked to infer that the voucher was not perfect, for the means of knowledge were with the auditor, and there can be no doubt but that the latter would have made its defects appear if any there had been.

And indeed it is confidently submitted that the relator's alternative writ now before the court is abundantly proper and correct; the various allegations concerning the execution of and charges of fraud against the said lease belong there; for it is the duty of the pleader to anticipate and answer each and every defense that can be made to the claim of the relator (*Cary's Sp. Pro. vol. 2, pp. 62 and 63; 1 Chitty's Gen. Pr., 808, 809*).

VIII. This lease was executed by direction of the board of supervisors in office in June, 1871; and in January, 1873, another and entirely new board of supervisors had come into office, chosen by the suffrages of the people when the cry for reform was rife through the land, and known as a reform board, which caused an investigation to be made concerning this and other leases, and they determined that the county of New York was legally liable for the rent reserved in the said lease.

And yet this court is asked to presume the present board of supervisors are outrageously corrupt, and have been guilty of the grossest fraud in the investigation concerning this lease and the audit of the relator's claim. But we submit



---

People *ex rel.* Stockwell agt. Earle.

---

that, if any presumptions are to be indulged in, directly the contrary must prevail, for this audit by the said board is, as we have shown, essentially a judgment—a judicial determination—and the maxim, therefore, undoubtedly is, *judicium semper pro veritabile accipitur*.

IX. If the decision of the board of supervisors be erroneous, it must be reviewed by a court of competent jurisdiction in the manner provided by law. It cannot be attacked collaterally (*People ex rel. Kinkel agt. Earle, supra*, J. F. DALY, J.).

X. The court should direct a writ of peremptory mandamus to issue, commanding the respondent to audit, approve and allow the voucher for the relator's claim.

LARREMORE, J.—The objections raised on the argument for writ of peremptory mandamus have been duly considered and have led me to the following conclusions:

*First.* The variance between the declaratory and mandatory part of the alternative writ is not fatal. Section 471 of the Code is a sufficient authority for an amendment of the proceeding.

*Second.* The plea of "no appropriation" is not properly interposed by the county auditor upon a proceeding to compel him to audit, approve and allow a claim, but should be reserved for an application to compel its payment.

*Third.* Sections 119 and 120 of the act to provide for the enrollment of the militia, passed April 23, 1862, confer sufficient authority upon the board of supervisors, not only to hire, but to erect a suitable and convenient armory, drill-room and place for the safe-keeping of arms, &c., and the expense thereof is made a county charge. The power given to provide for a permanent location of an armory, by erecting the same, may be fairly construed to authorize the hiring of a building for that purpose for a term of years.

*Fourth.* The question of fraud may be raised and investigated whenever it is made to appear, and the audit of the

---

People *ex rel.* Stockwell agt. Earle.

---

board of supervisors is not conclusive upon this point. *The People ex rel. Brown agt. Green* (46 *How. Pr. R.*, 302); *Same ex rel. Kinkel agt. Earle* (as modified at last general term); *People ex rel. Outwater agt. Earle*, are not adverse to this theory.

But the charge of fraud is general, and points out no specific act (save alleged excess of rent reserved) which the relator is called upon to controvert. In this particular the return is also insufficient.

But the respondent may have leave to file an amended return within ten days, when, if specific acts of fraud are alleged, the proof of which would avoid the lease, the issues thus raised may be ordered to be tried.

Cheever agt. Saratoga County Bank.

---

## SUPREME COURT.

SAMUEL CHEEVER agt. SARATOGA COUNTY BANK.

*Proceedings to perpetuate testimony.*

Under the Revised Statutes, article 5, title 3, chapter 7, part 3, a party to an action has not an absolute right to examine any witness under this statute at any time before or after issue joined.

The object of the statute is to *perpetuate* the testimony of a witness, whose evidence is material, and from age, non-residence or infirmity the party is in danger of losing if not perpetuated under this statute.

The proceeding under this statute must be taken in entire good faith. And where it is intended to include in the examination more than one witness, the judge before whom the examination is to take place will, in his discretion, determine which are to be examined and which not.

*Saratoga County, at Chambers, July 31, 1874.*

*Before Hon. C. S. LESTER, County Judge.*

THIS is a proceeding on the part of the plaintiff, to take the testimony of William Scott, president, and David M. Van Hoevenbergh, cashier of the defendant, under article 5 of title 3, chapter 7 of part 3 of the Revised Statutes.

*Townsend & Browne, for plaintiff.*

*J. C. Ormsby & N. C. Moak, for defendants.*

LESTER, Co. J.—The cause is at issue, and the defendant's counsel object to this examination on the ground that the proceeding is not in good faith to perpetuate the testimony of these witnesses, but to fish for testimony wherewith to make out a case against defendant.



---

Cheever agt. Saratoga County Bank.

---

It is claimed, and I understand not disputed, that the witnesses are residents of the county of Saratoga, and have no intention of departing therefrom; that they are in good health, and in all probability will be ready to be examined upon the trial; that one circuit has already passed since the cause was at issue when it might have been tried and these witnesses examined; that plaintiff voluntarily allowed the cause to go over the term, and that another circuit will occur next month. It is further claimed that under the pleadings the burden of proof is on the defendant, and these very witnesses must be used to establish any defense.

The plaintiff claims that a party to an action has an absolute right to examine any witness under this statute, at any time before or after issue joined. On the other hand, the defendant claims that it is a statute to enable a party to *perpetuate* the testimony of a witness whose evidence is material, and whose evidence, from age, non-residence or infirmity, the party is in danger of losing if not perpetuated under this statute.

The superior court, in *Paton agt. Westervelt* (5 How., 399), seems to have taken this view of the statute, and held that the court must be satisfied that the object of the proceeding was in *good faith* to perpetuate the testimony of the witness, and also to have held that a state of facts, similar to those in this case, was evidence that the proceedings were not in good faith to perpetuate evidence.

In the case of the witness Van Hoevenberg, who is a resident of this county, in good health, and in the prime of life, there does not seem to be any reason for taking his testimony that does not exist in the case of every witness in each of the three hundred cases at issue in this county. I do not understand the statute to have so broad an application. Such certainly has not been the general understanding of the profession, and I cannot find that the case of *Paton agt. Westervelt* has ever been doubted or questioned.

I shall, therefore, refuse to proceed with the examination

---

Cheever agt. Saratoga County Bank.

---

of Van Hoevenberg, and dismiss the proceedings as to him, for the reasons above stated. If I am wrong the plaintiff will have no difficulty in correcting my error.

In the case of Mr. Scott, it is stated that he is already eighty years of age, and although he appears to be in good health and "his eyes not dim nor his natural force abated," yet, since the days of the psalmist, the experience of mankind is that, beyond "three score years and ten," human life is exceptional and uncertain.

In case, therefore, the plaintiff files and serves an affidavit that this proceeding is taken in good faith to perpetuate the testimony of Mr. Scott, who, he is informed and believes, is upward of seventy years of age; that he desires and expects to use such evidence upon the trial of this action, in case Mr. Scott cannot attend as a witness, and that he is apprehensive that he may lose the benefit of the testimony of Mr. Scott, unless it is taken in these proceedings, I shall proceed with the examination of Mr. Scott.

As I presume from the statements of the plaintiff that such affidavit will be made, the parties, in pursuance of the agreement before me, will attend at the office of William C. McHarg, Esq., in the city of Albany, on the seventeenth of August, and proceed with such examination.

---

Reede agt. Schneider.

---

## SUPREME COURT.

GILBERT T. REEDE, appellant, agt. CHARLES G. SCHNEIDER  
and AUGUST SCHNEIDER, respondents.

*Specific performance — agreement to sell real estate.*

Where the evidence to extend the time of performance of an agreement to sell and convey real estate is directly conflicting, the finding by the court below thereon will not be disturbed on appeal.

Where the plaintiff is not in readiness to perform an agreement to convey real estate on the day specified in the contract, by reason of a failure to have released and discharged certain incumbrances on the premises which were required to be done by the contract, and no extension of the time of performance is agreed upon, he cannot insist upon a specific performance of the contract.

*New York General Term, March, 1874.*

*Before DAVIS, P. J., DANIELS and LAWRENCE, JJ.*

APPEAL from a judgment rendered at special term in favor of the defendants.

LAWRENCE, J.—The learned justice, before whom this cause was tried at special term, has found, as matter of fact, that, on the 1st day of November, 1871 (the time specified in the contract for the delivery of the deeds), the plaintiff did not perform the contract on his part, nor did he tender a performance. Also that, on the 1st of November, 1871, there were judgments against the plaintiff, in Westchester county, to the amount of \$3,451.49, which said judgments were unsatisfied of record, and a lien on the farm which the plaintiff had contracted to convey to the defendant, Charles G. Schneider.



---

Reede agt. Schneider.

---

Also, it was agreed between the parties that William F. Shirley, who was the owner of the Van Tassell and Crasto and Lynch and Bell mortgages, was, on the day the contract should be actually performed, to satisfy said mortgages and the Ibbotson judgment of \$800, and receive in the place thereof the mortgage of \$6,000, to be executed in pursuance of the terms of the contract on the Westchester property; and that the Building Material Company judgment of \$2,651 and the Bell judgment of \$779.18 against the plaintiff were released to the defendant, Charles G. Schneider, as liens on said Westchester property, the said releases having been duly executed prior to November 1, 1871, and ready for delivery on that day. He also finds that the title to said Westchester property was, on the 1st day of November, 1871, in one Samuel P. Dubois, and that, on the 11th day of February, 1872, it became vested in Caroline C. Shirley. He refused to find that the time for performing the contract was extended by mutual consent of the parties.

We have looked into the evidence contained in the printed case and see no reason for reversing the conclusion reached by the justice on these points.

The evidence, as to the extension of the time of performance, was directly conflicting; and there is, therefore, no ground for interfering with the finding.

The plaintiff not having been in readiness to perform on the day specified in the contract, and there having been no extension by the defendant, it is difficult to see on what ground a specific performance of the contract can be claimed. It will be observed that while releases of the judgments of the Building Material Company and of Bell had been actually obtained and were ready for delivery to Schneider on the first of November, the mortgages of Van Tassell and Crasto and of Lynch and Bell, and also the Ibbotson judgment, remained subsisting and unsatisfied liens on the property on the first of November; and that, as to these latter, it was agreed between the parties that Shirley, who owned them, was, on

---

Reede agt. Schneider.

---

the day the contract should be performed, to satisfy them and receive in place thereof the mortgage of \$6,000 on the Westchester property.

We cannot, under these circumstances, distinguish this case from the recent case of *Hinckley agt. Smith* (51 *N. Y.*, p. 21), decided by the commission of appeals. In that case the plaintiff had contracted to sell certain premises to the defendant, "free of incumbrances," for \$2,500, which sum the defendant agreed to pay; \$500 when the deed was delivered, and to give her bond and mortgage for the balance. The premises were incumbered by mortgage to the amount of \$3,000, and remained so incumbered at the time of the trial of the suit for specific performance.

The plaintiff tendered a deed at the time specified in the contract. The defendant had, prior to that time, written that she could not make the payment as agreed, and that she declined to take the premises. It was proved by the plaintiff that he had verbally arranged with the holders of the mortgages that they should take the mortgage to be given by the defendant and release their mortgages.

The complaint having been dismissed, it was held on appeal that there was no error, and that a tender of a deed, without releases of mortgages, was not an offer to perform the contract; and that the notice by the defendant of her intention not to perform, did not relieve the plaintiff from the necessity of having the mortgages discharged before a specific performance could be adjudged.

The mortgages held by Shirley never were released to the defendant, nor in any way discharged; and without such release or discharge, the case just quoted clearly shows that the plaintiff could not insist on a specific performance. As to the various exceptions taken by the plaintiff to the findings of fact, it seems sufficient to say that the first, second and third findings are supported by evidence given upon the trial; that the fourth and fifth findings are corrected by the sixth and seventh findings in the requests of the plaintiff, and that

---

People *ex rel.* Tracy agt. Green.

---

each and every of the refusals to find as requested are supported by some evidence given on the trial.

The evidence of the witness, Fluellen, in the view which we have taken of this case, even if improperly received, could not, in any way, prejudice the plaintiff, it being confined simply to the value of the Westchester property.

The judgment below is therefore affirmed, with costs to the respondents.

DAVIS, P. J., and DANIELS, J., concurred.

---

## SUPREME COURT.

THE PEOPLE *ex rel.* TRACY agt. ANDREW H. GREEN, Comptroller, &c.

*Mandamus—claim against the county—its legality.*

A legal claim against a county is not made so by its audit by the board of supervisors. What are and what are not county charges are settled by law, and when the board of supervisors determines the amount of the debt due from the county, resulting from services rendered or goods furnished, which relate to a county charge, their decision is conclusive, inasmuch as they act judicially.

Whether a claim is a county charge depends upon facts; and, in a proper case, they may be inquired into upon issues raised on an alternative mandamus issued for the payment of the claim.

*New York, Special Term, April, 1874.*

*Before BRADY, J.*

APPLICATION for a mandamus to compel the comptroller of the city of New York to pay the relator's claim.

BRADY, J.—The audit by the board of supervisors of a claim as a county charge will not have the legal effect of making it



---

People *ex rel.* Tracy agt. Green.

---

one, whether it be so or not. Such a proposition could not be entertained for a moment. What are and what are not county charges are settled by law, and when the board of supervisors determines the amount of the debt due from the county, resulting from services rendered or goods furnished, which relate to a county charge, their fiat is conclusive, inasmuch as they act judicially (*Brown agt. Green*, 46 *How. Pr. Rep.*, 302, and cases cited). Whether the relator's claim is within the term county charge, depends upon facts; and whether it should have been audited, assuming it—although it is otherwise averred—to be in its items, in all respects, just and true, are questions which he should have an opportunity to present for examination. It seems that at common law the sheriff was not bound, nor were the public authorities under any obligation, to provide the debtor in execution with meat or drink. "He ought to live of his own goods, and if he have no goods he shall live on the charity of others" (*Dive agt. Maningham*, 1 *Plow.*, 60, and cases cited, *per* MONTAGUE, *Ch. J.*); and this rule was expressed by the legislature, when by enactment it was declared that, "whenever any person shall be arrested by virtue of an execution upon any judgment rendered in a court of record, he shall be safely kept in secure custody, in the manner prescribed by law, at his own expense, until he shall satisfy such execution, or be discharged according to law" (3 *R. S.*, 5 *ed.*, 659, § 105).

Whether the rule extends to prisoners on *mesne* process, it may not now be necessary to inquire, although it would seem to be more appropriate to that class. The sum provided therefor by the act of the legislature for the "support of prisoners in the county jail" (*Laws* 1870, *p.* 877), was a gratuity by the people, in contravention, perhaps, of the common law and the statute already cited, which were in harmony and against the policy adopted. It may be that the amount thus given—namely, \$45,000, was for the support only of those without means, and therefore unable to

---

People *ex rel.* Tracy agt. Green.

---

supply their own wants. It is not impossible that this view will be ultimately accepted as a proper interpretation of this and similar provisions. However this may be, it seems that the appropriation is a gratuity, and, when exhausted, the obligation to apply it as directed having been made, all duties connected with it or created by it cease.

It seems also that the sum mentioned having been used for the purposes designed, as it is alleged, no claim resting upon supplies given to prisoners in execution existed as a valid charge against the county. There was no fund out of which it could be paid. The fund alone created the liability. It seems also that such a claim, not being valid, no further legislation of a general character providing for the payment of claims against the county is available to the relator. He is not, it seems, a creditor. His claim should be referred to by special mention, and thus recognized and allowed. There are no statutory laws in conflict with these views. The section in reference to prisoners (1 *Rev. Stat.*, 4th ed., 941, § 8) applies to those to be tried for criminal offenses and under sentence. They must be supplied with wholesome food at the expense of the county. It is not necessary, notwithstanding these views, to deny this motion.

I have only suggested the difficulties that must be overcome, perhaps, before the relator may demand his payment from the county; and, in order to have all the questions properly tried and disposed of, an alternative mandamus may be ordered, and all necessary issues, as well on his behalf or on behalf of the county, can be framed and decided.

Ordered accordingly.

---

Bacharach agt. Lagrave.

---

*Criticised  
59 May. 110*

## SUPREME COURT.

HERMAN BACHARACH and another, respondents, agt. ALFRED E. LAGRAVE, impleaded, &c., appellant.

*Extradition of fugitive from justice—prisoner's right to unrestrained liberty after acquittal.*

A person who has been surrendered by a foreign government, under an extradition treaty, for the commission of a crime here, coming within the treaty stipulation, has a clear and absolute right to return to the country from which he was taken, after the purposes of justice have been satisfied as to the particular offense for which he was surrendered. No other principle than that securing immunity from arrest for causes not provided for by the treaty, can either fairly or reasonably be deduced from the purposes and provisions of the constitution and laws of the United States relating to the removal of offenders from one state to another.

*First Department, General Term, May, 1874.*

APPEAL from order denying motion to vacate order of arrest.

*Charles W. Brooke, for appellant.*

*D. M. Porter and L. A. Gould, for respondents.*

DANIELS, J.—The defendant applied to have the order for his arrest vacated, because he had been brought into the United States as a fugitive from justice, under the extradition treaty existing between this country and France. He was arrested under the order before he could return to France, and while he was still in custody. After such arrest he gave bail, and



---

Bacharach agt. Lagrave.

---

in that manner secured his discharge. This circumstance is now relied upon, by way of answer to his application, as a waiver of his right to the relief asked for. And many authorities are cited by the plaintiff's counsel holding that an appearance in the action, even though informal, will be attended with the effect of waiving irregularities in the means made use of to bring the defendant into court. That principle, as a general proposition, is very well settled; but it does not follow from it that the defendant's application should be denied for that reason. What he particularly complains of now is, not the means or process by which he was brought into court, but the restraint imposed upon his person by the order of arrest. And among all the authorities relied upon, but one in any way affects the consideration of that point, and that is the case of *Petrie agt. Fitzgerald* (1 *Daly*, 405). In that it was held that a party arrested on the way from court, which he had attended as such, waived his right to be discharged, on the ground of his privilege, by giving bail in the action. This was held by the court as the result justified by the authorities, although very well considered cases were referred to, inconsistent with that view. And the conclusion was sustained because the order was not assailed, but the arrest made under its authority at a time when it could not be enforced (*Id.*, 407).

In the present case the order is assailed, not simply on the ground of a mere privilege, but because of the implied guaranty offered by the treaty that the defendant should be freely allowed to return to the country from whence he was brought, in pursuance of its provisions, for the sole and only purpose of being tried upon a specified criminal offense. Such a claim, it was held, in the case of *Williams agt. Bacon* (10 *Wend.*, 636), was not within the rule privileging suitors and witnesses from arrest whilst going to, attending at and returning from court. And while the application then made for the discharge of the order and the arrest under it were denied, it was not done because the right had been in any

---

Bacharach agt. Lagrave.

---

way jeopardized or lost by the proceedings taken in the case.

The provision of the Code upon this subject is comprehended in very general terms. It allows a party arrested on an order to apply on motion to vacate the order of arrest at any time before judgment, and even after that, where the arrest may be made less than twenty days before its recovery (*Code*, §§ 204, 183). These provisions contain no restriction as to the ground on which the application may be made; and the right secured by them is in no way rendered dependent upon the circumstance that no appearance may have previously been made in the action by the applicant; neither do they discriminate in any respect as to the grounds on which the discharge of the order may be applied for. The remedy is general in its nature; sufficiently so to include the protection of every possible right the defendant may be able to show in favor of his exoneration from the proceeding taken to arrest him; and, under its general nature, the motion may be made and maintained whenever it can be successfully shown that no right to the order and arrest, under the circumstances, existed after bail has been given, even though that may not be done in support of a mere personal privilege. Modern legislation in this state has been repeatedly changed for the purpose of facilitating the right of arrested parties to secure their discharge on bail, and afterward also by motion, where the right of arrest can be shown not to exist; and it is the duty of the courts to place no needless obstacle in the way of parties applying for the benefit of the provisions made in their favor, but to maintain and apply them in the spirit that has led to their enactment. Under these provisions no reason is apparent for including one case within them and excluding another from them, where the party arrested can show a positive right to be set at liberty. They were enacted for the purpose of protecting persons in the complete enjoyment of that right, when its existence can be satisfactorily maintained, without discrimination as to the

---

Bacharach agt. Lagrave.

---

peculiar reason on which it may appear to depend. Whether this should extend so far as to include the protection of a mere personal privilege, after bail has been given and a discharge secured in that manner, it is not designed at this time to decide. But where the law has secured an absolute right to exemption from arrest, the case is manifestly different, and within the protection of the provisions of the Code allowing the motion to be made after bail has been given.

The objection must, therefore, be considered and disposed of which has been presented in the defendant's behalf, whether an order for his arrest was proper under the circumstances shown in support of the present application. It may be properly assumed, in the disposition of it, that he was a fugitive from justice, residing in the French republic, and only amenable to the laws of this state by force of the extradition remedy provided for by the treaty. Without the provision made he could not have been brought here from that country; and that provided it could be done only in a prescribed and particularly enumerated class of cases. The effect of such a specification, according to well settled principles of construction, is to exclude the remedy from all but the enumerated cases. As to those not mentioned the negative is as effectually implied as though it had been expressly declared.

For that reason, when the defendant was extradited it was for the purpose of answering the crime mentioned in the proceedings taken against him, and for no other purpose whatsoever. As to all other matters, being beyond the reach of the laws of this state, he was absolutely entitled to his freedom. He was extradited for a single special purpose, that of being tried for the crime for the commission of which he was removed from the protection of the laws of France; beyond that he was entitled to the protection of those laws, so far as his personal liberty would have been secured by them in case no removal of his person had been made. In the language of the treaty, he was "delivered up to justice"



---

Bacharach agt. Lagrave.

---

because he was accused of one of the crimes which it enumerated (*Vol. 8 U. S. Statutes at Large*, 582, *art. 1*; *id.*, 617). And it was implied in his surrender that he should be at liberty to return again to France when the purposes of justice had been performed in the charge made against him. The nature of the treaty as well as good faith with the foreign power entering into it will permit of no other construction. That power consented, by the provision made, to surrender the person, entitled in all other respects to its protection, for trial and punishment on a particularly specified charge; and for no other end or object whatsoever. Without the provision made he could not be extradited at all; and by that it can only be done for a clearly defined object. And it therefore becomes the duty of the power to which the surrender may be made, faithfully to secure its proper observance. For some purposes that has been expressly provided by the act of congress requiring the president to take all necessary measures for the protection of the extradited person against lawless violence until the final conclusion of his trial for the crimes or offenses specified in the warrant, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter (*Vol. 15 U. S. Statutes at Large*, 337, § 1). It is true that this provision does not in terms include the present case, for it only extends to acts of lawless violence; but it is cogent evidence of the spirit of the obligation resting upon the public authorities to restrict the restraint imposed simply to the crime charged and mentioned in the treaty. The obligation is no greater to protect the party from lawless violence than it is to protect him from all other detentions of his person.

After the purposes of justice are satisfied as to the particular offense for which the party may be surrendered, then his right to return again to the protection of the laws he was deprived of for the single object allowed by the treaty, is clear and absolute.

---

Bacharach agt. Lagrave.

---

A different construction would involve consequences which no state having authority to protect its citizens or subjects, would be willing to submit to; for it would allow embarrassments and hardships that it could not be contemplated the authorities receiving them should be at liberty to inflict upon them. If the extradited person can be subjected to any further restraint than may appropriately appertain to the offense for which, under the terms of the treaty, he may be removed, he may be indicted and tried on criminal charges for which no surrender of his person could lawfully be required. And if that could be done, political offenders seeking refuge in one country could be returned on other charges, and then subjected to trial on accusations of that character, contrary to the policy of all civilized countries. Our own citizens are deeply interested in maintaining a construction of treaty stipulations which will be sure to avoid such abuses. And if a detention and trial for another offense would not be proper, it would seem to be clear that an arrest of the person at the private suit of another must be denied by the same principle. It is a consequence arising out of the implication that as to all but the extraditable offense, the accused shall enjoy the unrestrained liberty of returning to the country from which he was taken by force of the treaty provisions. Any different construction would be entirely unreasonable, and no enlightened nation would be willing to submit to it. It would be an abuse of the power provided for, allowing extradition only for clearly defined and particularly enumerated charges, and by necessary implication limiting it to those charges. If the power of detention and restraint is extended beyond them, then there is no obvious limit to which it cannot be carried; and a person brought into the country under the treaty for one purpose may be detained here indefinitely for an entirely different purpose. No people are more interested in denying such a latitude of oppression than our own; for, otherwise, our citizens could be forcibly taken abroad upon one charge, and detained there

---

Bacharach agt. Lagrave.

---

on the abandonment of that, upon others for which their extradition would never be consented to or allowed.

The principle in the case is an important one, and it necessarily grows out of these treaty stipulations with other countries. They are part of the supreme law of the state, superior to those of its own enactment, by an express provision of the constitution of the United States (*U. S. Const.*, art. 6, § 2). And it is the duty of the courts to maintain its observance. That cannot be done by allowing extradited persons to be arrested and restrained at the suits of private persons unless they elect to remain in the country after their discharge from the proceedings provided for by the treaty. In the absence of such election the person is entitled to full liberty, for the purpose of regaining his former habitation; and an arrest in a private action is entirely inconsistent with the preservation and enjoyment of that right. Process in no way interfering with that privilege may be properly sustained, but certainly nothing going beyond that.

The case of *Williams* agt. *Bacon* (10 *Wend.*, 636), arising under the constitution and laws of the United States relating to the removal of offenders from one state to another, may not harmonize with the views here expressed. If it does not, then it must so far be regarded as unsound, as it may very well be. Certainly no other principle than that securing immunity from arrest for causes not provided for by the treaty, can either fairly or reasonably be deduced from its purposes and provisions; and if this authority is inconsistent with that idea, then it should not be regarded as binding.

The order appealed from in this case, and that in the suit of *Adriance* and others argued with it, must be reversed, with ten dollars costs in each appeal, and orders entered setting aside the orders of arrest, &c.

DAVIS, P. J., and BRADY, J., concurred.

NOTE.—The able opinion given above is unquestionably correct, assuming, as the court does, that the extradition proceedings under which the



---

Bacharach agt. Lagrave.

---

defendant was brought here were valid and lawful. But this seems to be the most important point in this case. Judge FANCHER, when this case was before him on *habeas corpus* (45 How. Pr. R., 301), held, that the defendant had not, as the proofs showed, committed any crime for which, under the treaty between the United States and France, he could be demanded by the one government or extradited by the other. The defendant was charged and indicted for an offense which, by our New York statute, is defined as burglary in the third degree. This is only a statutory offense, and was not known to the common law. The common-law offense of burglary is not charged, nor does the indictment allege it; nor does the treaty between the United States and France provide for the demand and extradition of a fugitive for our statutory offense of burglary in the third degree. The treaty refers to the common-law offense of burglary. It is plain that, under the facts and circumstances touching the extradition of the defendant, and the bringing of him forcibly from France to the United States, the whole proceeding was unauthorized and illegal. He was seized and kidnapped in France through the instrumentality of J. M—, an alleged detective, and by him was forcibly brought to the United States on the French steamer "Washington," without any charge having been made for which he could lawfully be extradited. The judge also says that where a prisoner is without the jurisdiction of the court, and is, by force or fraud, brought within it, he cannot be arrested and proceeded against in a civil action, at the suit of any party concerned in bringing him within such jurisdiction, and discharged the defendant from arrest in such actions; but said that it was no ground for discharging a prisoner from arrest, in a *criminal matter*, that he had been forcibly brought within the jurisdiction, and remanded the defendant for trial on the indictment for burglary in the third degree.

Now, from the opinion of judge DANIELS, we think this was error; for he says that if the extradited person can be subjected to any further restraint than may appropriately appertain to the offense for which, under the terms of the treaty, he may be removed, he may be indicted and tried on criminal charges for which no surrender of his person could lawfully be required. And if that could be done, political offenders seeking refuge in one country could be returned on other charges, and then subjected to trial on accusations of that character, contrary to the policy of all civilized countries. Our own citizens are deeply interested in maintaining a construction of treaty stipulations which will be sure to avoid such abuses. And if a detention and trial for another offense would not be proper, it would seem to be clear that an arrest of the person at the private suit of another must be denied by the same principle. It is a consequence arising out of the implication that, as to all but the extraditable offense, the accused shall enjoy the unrestrained liberty of returning to the country from which he was taken by force of the treaty provisions. Any different

---

Bacharach agt. Lagrave.

---

construction would be entirely unreasonable, and no enlightened nation would be willing to submit to it.

It seems clear, therefore, from this reasoning and argument of judge DANFELS, that where the defendant is kidnapped, and forcibly and against his will brought here without any treaty stipulation, or, which is the same thing, one procured through fraud and deceit, and void on its face as being for a crime not recognized by any treaty stipulation, the defendant is entitled at once to his unrestrained liberty to return to his native country and the protection of its government.—[REP.]

---

Levy agt. Lock.

---

## N. Y. COMMON PLEAS.

LAWRENCE L. LEVY, appellant, agt. JOHN LOCK, respondent.

*Limited partnership — notice — liability*

The object of the statute in providing for the formation of limited partnerships was to compel those who claim the benefits of its exemptions to give public notice of the terms of the partnership, that all who deal with it may know the extent of the credit and liability which it assumes.

It was also intended for the mutual protection of the special partner and those dealing with him, and should be construed in the spirit with which it was framed.

All that the law requires in the formation of a limited partnership is a substantial compliance with its provisions. The filing of the certificate and affidavit required, twenty-eight days after they were executed, could not affect the validity of the partnership as to those who dealt with it after the date of such filing.

*General Term, February, 1874.*

*Before DALY, Ch. J., ROBINSON and LARREMORE, JJ.*

APPEAL by plaintiff from a judgment at special term.

*J. C. Levi*, for appellant.

*G. A. Seixas*, for respondent.

LARREMORE, *J.*—On the 15th of March, 1871, the firm of White, Son & Whitmore (of which the defendant claimed to be a special partner) made two promissory notes to the order of plaintiff, at five and seven months, for \$644.19 each; judgment was rendered in the court below against the defendant,



---

Levy agt. Lock.

---

as a general partner of said firm, and from the reversal of said judgment by the general term of that court, this appeal is taken. The evidence discloses the following facts, to wit:

That James M. White, Charles C. White, Stephen O. Whitmore and John Lock (the defendant) entered into a copartnership agreement, dated April 25, 1870, in which it was stated that the partnership thereby formed should commence May 2, 1870, and continue for two years. That said Lock should contribute \$5,000 to the capital thereof as a special partner, which he was thereby declared to be. It was therein further provided and agreed that the usual statutory proceedings should be instituted immediately after the execution of said agreement, to secure Lock his rights and immunities as such special or silent partner. On May 17, 1870, the said partners duly executed and acknowledged the certificate required for the formation of a limited partnership, together with the affidavit showing the payment of the special capital, which said certificate and affidavit were duly filed and recorded on the 14th of June, 1870, and publication thereof duly made for the time and in the manner prescribed by the statute.

It does not appear when said firm commenced to do business, or that any business of any kind was transacted by it prior to June 14, 1870.

On this statement of facts the liability of defendant as a general partner of said firm is to be determined. All that the law requires in the formation of a limited partnership is a substantial compliance with its provisions (*Bowen* agt. *Argall*, 24 *Wend.*, 496; *Madison County Bank* agt. *Gould*, 5 *Hill*, 309; *Smith* agt. *Argall*, 6 *Hill*, 479).

The object of the statute is to compel those who claim the benefit of its exemptions to give public notice of the terms of the partnership, that all who deal with it may know the extent of the credit and liability which it assumes. The statute referred to (1 *R. S.*, *Edmonds*, 716 and 717), as preliminary to the formation of such a partnership, requires that a

---

Levy agt. Lock.

---

certificate thereof, with an accompanying affidavit, be filed and recorded in the clerk's office of the county, showing the title of the firm, the names of the partners, the general nature of the business, the amount of capital contributed in cash by the special partner and the period at which the partnership is to commence and terminate.

The certificate and affidavit filed by the defendant and his copartners, on the 14th of June, 1870, and the publication of the terms of the said partnership, were each and all of them in conformity with said statute.

That said certificate and affidavit were not filed and recorded on the day of their execution (May 17, 1870), but twenty-eight days thereafter (June 14, 1870), could not affect the validity of said partnership, as to those who dealt with it, after the date last named. On that day the special partnership was duly formed, and, as to the plaintiff (whose claim accrued nine months thereafter), was as effectively and substantially formed as though the papers had been filed and recorded on the day of their execution.

There is no requirement of the statute that such execution and filing shall be cotemporaneous acts. The only disability imposed by it is that, until such record is made, no special partnership is formed; nor should the plaintiff be permitted to assail said partnership on the ground that it was declared to have commenced at a period prior to the filing of said certificate. His debt, as before stated, was subsequently contracted, and he was in no way prejudiced or misled. This distinction was recognized in the case of *The Madison Co. Bank agt. Gould*, where an error occurred in the notice of the partnership, which stated that it was to commence November sixteen instead of October sixteen; and judge BRONSON says: "If this contract (the one in suit) had been made before the time mentioned in said notice for the commencement of the partnership had arrived, the objection would be fatal." In that case it was assumed that the partnership was properly formed, although the judgment was

---

Levy agt. Lock.

---

reversed upon other grounds. The rulings in *Andrews* agt. *Schott* (10 Penn., 4 Barr, 47) are not in point. That case decides that the use of the word "company" in a firm name was in violation of a statute of the state of Pennsylvania, and that the special partner was liable for that reason, and also for the fact that third persons entered the firm as general partners. The obligations in this case having been incurred after the special partnership was formed, the defendant cannot be charged *in solido*, nor made liable beyond the amount of his capital. The statute under which said partnership was formed was intended for the mutual protection of the special partner and those dealing with him. It should be construed in the spirit with which it was framed. To invite capital it offers the inducement of a limited liability on the part of the investor; and, while its provisions should be rigorously invoked and applied in behalf of one who suffers by their violation, a wise discrimination should be exercised in their application to one who seeks to obtain an undue advantage thereby.

The judgment appealed from should be affirmed.

Ch. J. DALY and ROBINSON, J., concur.



---

Crill agt. City of Rome.

---

## SUPREME COURT.

DANIEL CRILL agt. THE CITY OF ROME.

*Mohawk river — the title thereto — use of its waters for different purposes.*

The Mohawk river is a navigable stream, and the title to the bed of the river is in the people of the state. Riparian owners along the stream are not entitled to damages for any diversion or use of the waters of the Mohawk by the state.

Although the law has been settled that the people of the state are proprietors of the waters of the Mohawk river, having the title thereto, the same are not necessarily to be used by them exclusively for purposes of navigation.

The city of Rome was expressly authorized to construct "water-works," and supply the city with water, by an act of the legislature, passed April 24, 1872 (*Laws 1872, ch. 352*).

The plaintiff, having a mill privilege in the city of Rome, supplied by water taken by means of a dam and an artificial channel from the Mohawk river, brought an action to restrain the city from taking the waters of the Mohawk river at a point called the Ridge, for the purpose of supplying the city with pure and wholesome water, in pursuance of said act.

*Held*, that if the plaintiff was not the owner of the waters of the Mohawk river, nor entitled, as a matter of right, to their use at the time the defendant began to divert them, then he has no foundation for the action.

The plaintiff claimed title under the "Oriskany patent," April 18, 1705, which he alleged was granted by the English government, and which had full authority to pass the title to a private citizen.

*Held*, that the Oriskany patent was not granted by the English government, but was issued by lord CORNBURY, captain-general and governor of the colony of New York; and assuming that he possessed the same and no greater power than the sovereign of Great Britain, and it not being shown that the sovereignty acted in issuing the patent, it was clear that the patent did not pass the title to the waters of the Mohawk to private citizens named as patentees. The power of the king to grant rights in navigable streams, since *magna charta*, is settled in England against such right. When the revolution took place, the people of each state became themselves sovereign, and in that character held the abso-

---

Crill agt. City of Rome.

---

lute right to all the navigable waters and the soils under them for their own common use.

The plaintiff claimed a right to divert the waters of the Mohawk for the purpose of his mill privilege, by means of a dam in the river, and that such claim might be sustained by adverse possession and prescription.

*Held*, that the erection of the dam was a nuisance, and the continuance thereof could not, as against the state, give the plaintiff, or his grantors, a valid claim to maintain the interference with the public waters. It is not for the plaintiff to establish a prescription against the state when the state has the right and has exercised the right to the use of said waters. Plaintiff claimed that when the act of 1872 was passed, authorizing the defendant to take the waters of the Mohawk, the people could not have maintained an action for the use thereof under section 75 of the Code, which declares that the people will not sue for or in respect to any real property, unless within forty years the people shall have received the rents and profits of such real property, or some part thereof.

*Held*, that certainly it could not be maintained that the state, since its purchase of the Inland Lock Company, in 1792, and the construction of the Erie canal of 1817, had not used the waters of the Mohawk river, or "some part thereof." The evidence establishes such use at the city of Rome, and at many other points along the river. Complaint dismissed.

*Oneida Special Term, October, 1873.*

THE plaintiff, having a mill privilege in the city of Rome, supplied by water taken by means of a dam and an artificial channel from the Mohawk river, brings this action to restrain the defendant, the city of Rome, from taking the waters of the Mohawk river at a point called the Ridge, for the purpose of supplying the defendant's "water-works" with pure and wholesome water.

The city was expressly authorized to construct "water-works," and to supply the city with water, by an act of the legislature, passed April 24th, 1872, chapter 352, Laws of 1872.

The mill privilege of the plaintiff is not now in use and has not been for some time prior to the commencement of this action.

*Waterman & Hunt & A. M. Beardsley, for plaintiff.*

*B. J. Beach & Henry A. Foster, for defendant.*

---

Crill agt. City of Rome.

---

HARDIN, J.—Upon the hearing, the defendant offered in evidence Colden's History of the Five Nations of Indians, Stone's History of Brant, The Documentary History of New York, Rees' Cyclopædia, and Jones' Annals and Recollections of Oneida County, for the purpose, in connection with other evidence, of establishing that the Mohawk river was actually navigable for commercial purposes.

The plaintiff objected to the histories, and the maps contained in them, and the question was reserved by consent, and is now determined by overruling the same, except as to Jones' Annals and Recollections. The latter does not purport to be a general history, and its author is living and might be called. The Documentary History was published under the authority of the state, and the writers of the others have long since been dead (1 *Greenleaf Ev.* [10 ed.], §§ 491, 492 and 497; 7 *Peters*, 554; 1 *Salkeld*, 281; 4 *Sand. Ch. Rep.*, 633; 1 *Wilson*, 170; *McKennon agt. Bliss*, 21 *New York*, 206). The evidence before the court requires a finding that the Mohawk river was a navigable river, in fact, for commercial purposes. This conclusion is confirmed by the course of legislation and judicial decisions.

Several cases have arisen in respect to the waters of the Mohawk river, and very much discussion has been had on them in respect to the applicability of the common law of England in respect to navigable streams, and it has been very distinctly held and settled that (1.) "The Mohawk river is a navigable stream, and the title to the bed of the river is in the people of the state." (2.) "Riparian owners along the stream are not entitled to damages for any diversion or use of the waters of the Mohawk by the state" (*The People ex rel. Loomis agt. The Canal Appraisers*, 33 *New York*, 461).

Such is the doctrine established by the court of last resort in this state, and the same is not open for cavil or discussion in this court.

The learned counsel for the plaintiff insists that, if it be found that the law has been settled that the people are pro-



---

Crill agt. City of Rome.

---

prietors of the waters of the Mohawk, having the title thereto, that the same are to be used by them exclusively for purposes of navigation.

That question was raised and presented for discussion and decision in *Commissioners Canal Fund* agt. *Kemshall* (26 *Wendell*, 405), but was not passed upon by the court; though in the opinion delivered by senator VERPLANCK the right to divert the waters, and use them by the state for artificial navigation, was repudiated. But the question has been presented in other cases, and the courts have settled the question adverse to the claim of the plaintiff (*Gould* agt. *H. R. R. Co.*, 2 *Selden*, 522; *The People* agt. *Tibbitts*, 19 *N. Y.*, 527), and at page 528, it is said by the court, "the state may, as such proprietor of the waters, grant them or any interest in them to an individual. \* \* It can dispose of them to the exclusion of the riparian owners" (*Page* 528, *opinion of STRONG, J.*).

So, too, in *Loomis* agt. *Appraisers* (33 *N. Y.*, *supra*), it appeared that the claim of the riparian owner was based upon an allegation that he was owner by virtue of a grant of the waters of the Mohawk, and that the people, by means of a state dam, had diverted the waters from the current or bed of the natural stream, and conducted them to the Erie canal above the falls, and thus damaged the mill property of the relator; and the court held that the state had a right to thus divert the waters from the river, and by so doing was not liable for injuries sustained by the riparian owner.

Between individuals, the rule would be otherwise; and in the absence of the authority of the legislature no such right of diversion could be exercised without subjecting a party to damages (*Varick* agt. *Smith*, 5 *Paige*, 137; *Clinton* agt. *Myers*, 46 *N. Y.*, 511).

The learned counsel for the plaintiff is correct in saying that the act authorizing the taking of the waters of the Mohawk is local, but the use for which the waters are taken is a public one (§ 462 of *Dillon on M. Corporations*,

---

Crill agt. City of Rome.

---

at page 447; 2 *Johnson's Ch.*, 162; 2 *Denio*, 433; 3 *Selden*, 314; 43 *N. Y.*, 137, and 46 *N. Y.*, 550).

It is difficult to see any good reason why the people, if regarded as having the sole right to the use of the waters of a river, and authorized to divert them for purposes of artificial navigation, or to lease them to individuals, may not be equally possessed of the power to authorize them to be taken and applied for the "public use" contemplated by the act authorizing the defendant to construct its water-works and use the waters for supplying its inhabitants with pure and wholesome water.

But the question need not be determined in this action as to the effect of the act of 1872. If the state shall, by the action of its law officer, or otherwise, interfere with the defendant's use of the waters of the Mohawk, for the purposes of its water-works, the question will be more fully before the court (26 *N. Y.*, 297, and cases there cited).

If the plaintiff was not the owner of the waters of the Mohawk, or was not entitled, as a matter of right, to their use, at the time the defendant began to divert them, then he has no foundation for this action.

The learned counsel of the plaintiff put in evidence the Oriskany patent, granted April 18th, 1705, commonly known as the "Orsikany patent," granting to the patentee "two miles on each side of the Mohawk, up the stream, from the Oriskany creek to the Oneida carrying path, and thence along the path the same depth into the woods on each side to the swamp Corüngolka, with all the marshes, swamps, ponds, pools, waters, water-courses, rivers, rivulets, runs and streams of water lying and being, or to be enjoyed within the bounds and limits of the parcels and tracts of land aforesaid," and now claims that the conveyance carried to the patentees the bed of the stream of the Oriskany and Mohawk, notwithstanding the Mohawk river was navigable.

He insists that the "English government had full authority to pass the title to a private citizen."

---

Crill agt. City of Rome.

---

It is to be observed that the Oriskany patent was not granted by the "English government."

It was issued by lord Cornbury, captain-general and governor of the colony of New York.

For the purposes of passing upon the question raised, it may be assumed that he possessed the same and no greater powers than the sovereign of Great Britain. It was not shown by any evidence, nor claimed in the argument of the plaintiff's learned counsel, that the sovereignty acted in issuing, or authorized the issuing of the patent in question.

Did the patent pass the title to the "waters of the Mohawk to private citizens," named as patentees?

The cases already referred to seem to require the question to be answered in the negative.

In considering this question it may be assumed that the governor who issued the patent possessed the same power and prerogative, in respect to the waters of a navigable stream, as the king of the mother country; but the settled distinction between the powers of the sovereign and the powers of the sovereignty must be borne in mind.

The king could only grant so much as he possessed, as was of a private character, or that might be enjoyed so as not to be detrimental to the *jus publicum*, and such parts of his grant as interfered with the *jus publicum* were void. Such a grant did not divest the king, nor invest the grantee from him (*Attorney-General agt. Portich*, 10 *Price*, 378 and 412; 8 *Bacon*, p. 20-25-28, 29; 4 *Wendell*, 20; *People agt. Vanderbilt*, 38 *Barb.*, 286; and same case affirmed, 26 *N. Y.*, 287).

In *Martin agt. Waddell* (16 *Peters' U. S. R.*, 410), the power of the king to grant rights in navigable streams was under consideration. Chief Justice TANEY says: "From the opinions expressed by the justices of the court of king's bench in the case of *Blundall agt. Callerall* (5 *Barn. & Ald. R.*, 287), and under case of the *Duke of Somerset agt. Fagwell* (5 *Barn. & Cress.*, 883), the question must be



---

Crill agt. City of Rome.

---

regarded as settled in England against the right of the king, since *magna charta*, to make such a grant."

He adds that "when the revolution took place, the people of each state became themselves sovereign; and in *that* character hold *the absolute right* to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the constitution to the general government" (p. 410).

The people of this state, acting through their legislature, have never recognized a private ownership of the waters of the Mohawk, by an express enactment; but several acts are found in which the right of the sovereignty over the navigable rivers has been asserted.

In the act passed 5th May, 1786, entitled "An act for the speedy sale of the unappropriated lands within the state," in section 18, it was enacted "that it shall and may be lawful for the said commissioners to grant such and so much of the lands under the water of *navigable* rivers as they shall deem necessary to promote the commerce of the state" (1 vol. *Greenleaf's Ed.*, p. 284).

The act authorizing lock navigation within this state, passed 30th March, 1792, and the amendment of December, 1792, was passed by the legislature, and contains clear and positive assumption of title in the state to the Mohawk river.

In the eighteenth section of the original act of March, 1792, under which locks and canals for the Western Inland Lock Navigation Company were constructed in 1795 and 1797, at Little Falls and Rome, there was inserted a provision requiring such works to be constructed, so as "that boats drawing, when loaded, two feet of water, and of the length of forty feet, and of the breadth of twenty feet, may ascend and descend the Mohawk river, in *every* part of the said river between the town of Schenectady and the waters of Wood creek."

The act of March 24, 1791, authorized a survey to be made "of the ground situate between the Mohawk river, at

---

Crill agt. City of Rome.

---

or near Fort Stanwix, and the Wood creek, and the Hudson river, at the expense of the state" (2 vol. *Greenleaf's Ed.*, 374).

A survey of the river was made, and minute observations taken and reported to the proper state officers in pursuance of that act. The perusal of the survey and report, and the acts referred to (*supra*), leave no room to doubt that the people of the state thus early asserted title to the waters of the Mohawk river.

The same conclusion is supported by other legislative enactments (*Session Laws of 1805, Webster's ed., vol. 4, p. 127; Laws of 1823, pages 416, &c.; see Washburn on Easements, p. 478; see Laws of 1817, p. 302; Canal Appraisers agt. People, 17 Wendell, 600*).

It was said by JOHNSON, J., in *Brown agt. Schofield* (8 Barb., 242), "that courts are bound to notice the statute which declares the character of a river in question." That case also holds, in direct terms, that the common law of England, as to the navigability of streams, has never been adopted in this country (*See page 443, and cases cited*).

The state has authorized the construction of feeders, by which some of the waters of the Black river are turned into the Black River canal, the Erie, and some into the Mohawk river, above the point where the defendant takes water from the Mohawk river (*Laws of 1836, chapter 157, § 1*).

The plaintiff has no title to the waters of the Black river; the use thereof belongs to the state as the owner thereof, free of any rightful claims thereto by the plaintiff.

The plaintiff claims a right to divert the waters of the Mohawk for the purposes of his mill privilege by means of a dam in the river, and his learned counsel insists that such claim may be sustained by adverse possession and prescription.

The views already expressed lead to the conclusion that the erection of the dam was a nuisance, and the continuance thereof could not, as *against the state*, give the plaintiff or his

---

Crill agt. City of Rome.

---

grantors a valid claim to maintain the interference with the public waters (*People* agt. *Vanderbilt*, *supra*).

It is not with the plaintiff to establish a prescription against the state, when the state has the right, and has exercised the right to the use of the waters, as has been already seen (17 *Viner*, *Prescription*, 6 page, 279).

There was no lawful beginning (*Weld* agt. *Hornby*, 7 *East R.*, 198; *Fowler* agt. *Sanders*, *Croke Jac.*, 446; *Mills* agt. *Hall*, 9 *Wendell*, 315; *Dygert* agt. *Schenk*, 23 *Wendell*, 446; *The People* agt. *Cunningham*, 1 *Duer*, 524; *Washburn on Easements*, 480).

In *People* agt. *Cunningham* (*supra*) there was an obstruction by placing pipes in a public street in the city of Brooklyn, and the party undertook to defend his nuisance upon the public highway by showing a long continuance thereof, and to such an extent as was claimed would legalize it. JEWETT, J., said that "no lapse of time will enable a party to prescribe a nuisance, and that it was immaterial how long the practice had prevailed," p. 536 (*See Taylor* agt. *People*, 6 *Parker Crim. R.*, 352, *Op. of DANIELS, J.*).

In *Campbell* agt. *Seaman* (2 *Supreme Court Reports*, 240), POTTER, J., says, whatever may be the rule in England "on the subject of gaming, the right to continue a nuisance by prescription, \* \* no such rule prevails in this state."

The rule is the same in Massachusetts as in this state (*Commonwealth* agt. *Upton*, 6 *Gray*, 473).

It is suggested by the plaintiff's learned counsel that when the act of 1872 was passed, authorizing the defendant to take the waters of the Mohawk, that the people could not have maintained an action for the use thereof, and section 75 of the Code is relied upon to aid the plaintiff.

That section declares that the people will not sue for or in respect to any real property, unless within forty years the people shall have received the rents and profits of such real property or *some part thereof*. Certainly it cannot be maintained that the state has not used, since its purchase of the



---

Crill agt. City of Rome.

---

Inland Lock Co., and the construction of the Erie canal, under the act of 1817, the waters of the Mohawk river, or "some part thereof."

The evidence in this case clearly establishes such use at the city of Rome; the same is true at many other points along the river.

If the plaintiff was the owner of the waters of the Mohawk, or rather had a vested right in them, or the use thereof, so as to enable him to lead them to his mill privilege, his remedy, as he has sought it by an action to restrain the defendant from interfering with such right to use them, would be proper.

In such cases an injunction may now be allowed, in the discretion of the court, before the party has had a trial, in an action at law before a jury (5 *Selden*, 523; 2 *John. Ch.*, 162; *Corning* agt. *Nail Factory*, 40 *N. Y.*, 191, and *S. U.*, 39 *Barb.*; *Pollet* agt. *Long*, 58 *Barb.*, 20-34; 2 *Supreme C. R.*, 240; 19 *Barb.*, 379). But before such injunction can be granted, a party must show that his property, or his right to use property has been interfered with by the defendant.

Having reached the conclusion that the Mohawk is a navigable stream, and that the state has the proprietorship of its waters, and that the title to them is not in the plaintiff, and that he is not entitled to divert the waters from the river, it follows that judgment must be ordered in favor of the defendant, dismissing the plaintiff's complaint with costs.

---

Slingerland agt. Bronk.

---

## GREENE COUNTY COURT.

HENRY SLINGERLAND, plaintiff and respondent, agt. MARTIN  
V. BRONK, defendant and appellant.

*Appeal from judgment of a justice of the peace — points of law only —  
insufficient notice.*

On an appeal from a justice's court, upon questions of law only, the appellant cannot insist upon any error not specified in the notice of appeal.

The appellant in this case having failed in his notice of appeal to specify the evidence claimed to be improper, illegal and irrelevant, or to specify in what particular the judgment is against the law and evidence in the case, the judgment of the court below (which was taken by default) for these reasons affirmed.

*April Term, 1874.*

THIS action was brought to recover a statute penalty of fifty dollars for taking down and destroying a notice of sheriff's sale. The judgment was taken by default before the justice in the court below, and the appeal therefrom was brought upon questions of law only. Notice of appeal contains eight grounds of error.

4th, 5th and 6th grounds of error are as follows :

"4th. That improper, illegal and irrelevant evidence was admitted by the said justice on the trial of said cause, on the part of the plaintiff in the absence of the said defendant.

"5th. That the said judgment is against the law and evidence of the case.

"6th. That said action being brought to recover a penalty, the statute regulating said action should have been strictly pursued, which was not done in pursuance to the practice under said statute, in which particular the said justice erred."

---

Slingerland agt. Bronk.

---

The appellant claimed, on the argument of the appeal, that under the foregoing points of error he could bring up for review these questions which presented themselves as errors on the face of the return, viz.: "That the said justice erred in admitting parol evidence of the judgment recovered, and the contents of the notice of sale; also, of the contents of the execution under which said notice was alleged to have been posted and said sale made, without showing the loss and destruction, or showing the right of plaintiff to give parol evidence of their contents by notice to produce or otherwise. Also, that this being a penal statute, the plaintiff was bound to show affirmatively that said notice of sale was not taken down by consent of the party suing out such execution and of the defendant therein, and further that such execution was not satisfied." The respondent objected and claimed that the notice of appeal was not sufficient to bring up for review the above questions of error.

The appellant cites in support of his theory the case of *Cole* agt. *Bell* (48 *Barb.*, 194), being a general term decision of this district, and *Forman* agt. *Forman* (17 *How. Pr. R.*, 255).

The respondent cited in support of his objection the case of *Delong* agt. *Brainard* (1 *N. Y., Sup. Ct.*, 1) and *Nolan* agt. *Page* (*id.*, 2, *Addenda*).

Other facts appear in the opinion.

*E. Raymond*, attorney for respondent.

*Olney & Hiseerd*, attorneys for appellant.

*By the Court*, MANLEY B. MATTICE, *Co. J.*—This action was brought to recover a penalty against the defendant of fifty dollars for taking and destroying a sheriff's "notice of sale" under an execution.

The defendant did not appear on the trial of cause. The justice rendered judgment against the defendant for fifty dollars and costs.



---

Slingerland agt. Bronk.

---

The defendant, in his notice of appeal, states "that improper, illegal and irrelevant evidence was admitted by the said justice on the trial of said cause, on the part of the plaintiff, in the absence of said defendant."

The notices of sale, posted by the sheriff, one of which was alleged to have been torn down, nor the execution, by virtue of which the levy was made and said notices of sale posted, were offered or introduced in evidence on the trial, but their contents allowed to be given without showing their loss or destruction, or showing the right of plaintiff to give parol testimony of their contents by notice to produce, or otherwise.

It nowhere appears in evidence that said notice of sale was not taken down by consent of the party suing out such execution, and of the defendant therein.

It is claimed by the respondent that if any errors were committed by the introduction of testimony, or any defect in the testimony given, the appellant's notice of appeal is not sufficiently specific to justify a review in this court.

It nowhere appears in the notice of appeal that the justice improperly admitted oral testimony of the contents of written instruments, &c., or that the testimony was defective and insufficient in not showing, &c.

All the evidence introduced was necessary testimony for the plaintiff, but the manner of introducing it is all the appellant can complain of.

Now, was the notice of appeal sufficiently specific to bring these questions up for review?

In the case of *Delong agt. Brainard* (1 *N. Y. S. Court*, page 1), a very recent case, it is held "that when the appellant, in his notice of appeal upon the law, assigns as grounds of appeal that the justice erred in allowing incompetent evidence on the trial, the judgment is entirely unsupported by the evidence given, &c., on the whole evidence, the plaintiff was not entitled to recover, and that the judgment is contrary to law upon the facts proved," it is not sufficient to sustain an appeal.

---

Slingerland agt. Bronk.

---

The court at general term (fourth department) says: The return shows numerous objections to the admission of evidence, but none is pointed out in the notice of appeal. That part of the notice of appeal which relates to the admission of evidence is altogether too general to apprise the party or the justice of the specific error which it was claimed had been committed.

The other specifications are also very vague, and amount to little more than saying the judgment is wrong (*See Nolan agt. Page*, 1 *N. Y. S. Court*, page 2, *Addenda*).

The appellant cannot, upon appeal from justice court, upon the law only, insist upon any error not specified in the notice of appeal (*Avery agt. Woodbeck*, 62 *Barb.*, 557).

The preponderance of authorities appear to be that unless the notice of appeal specify and point out clearly the grounds of error complained of, so that the justice or the adverse party may be fairly apprised of the grounds on which a reversal of the judgment is sought, it will be held to be insufficient to justify a review of the judgment.

In this case the appellant failed in his notice of appeal to specify the evidence claimed to be improper, illegal and irrelevant, or to specify in what particulars the judgment is against the law and evidence in the case.

The judgment must, for these reasons, be affirmed, with costs.

---

Knoeppel agt. Kings County Fire Insurance Company.

---

*Amherst  
3 Abb N.S. 430*

N. Y. SUPERIOR COURT.

WILLIAM H. KNOEPEL agt. KINGS COUNTY FIRE INSURANCE  
COMPANY.

*Deposition of party to an action—power of court—section 401 of the Code.*

The court has no power to appoint a referee to take the affidavit or deposition of a party to an action on a motion, on behalf of the adverse party, under the seventh subdivision of section 401 of the Code, chapter 8, which falls under the title of "motions and orders."

The 389th section of the Code, chapter 6, the title of which falls under the "examination of parties," positively forbids any action in aid of the prosecution or defense of another action, or any examination of a party in behalf of the adverse party, "except in the manner prescribed by this chapter."

*Special Term, July, 1874.*

MOTION for the appointment of a referee to take the examination of a party.

*Sullivan, Kobbe & Fowler, for plaintiff.*

*Rodman & Adams, for defendant.*

SPEIR, J.—There seems to be a conflict of authority whether the court has power to appoint a referee to take the affidavit or deposition of a party to an action on a motion, on behalf of the adverse party, under the seventh subdivision of section 401 of the Code. Judge CARDOZO, in *Fisk agt. Chicago, Rock Island and Pacific R. R. Co.* (3 Abb. [N. S.],



---

Knoeppel agt. Kings County Fire Insurance Company.

---

430), held such power was given. Judge BARRETT held the opposite opinion in *Hodkin* agt. *Atlantic & Pacific R. R. Co.* (5 Abb. [N. S.]). The authority stands balanced.

If it be supposed that the 401st section, subdivision 7, furnishes authority for the action of the court, it is not only in contradiction of the 389th section of the Code, but it is absolutely forbidden by it. That section declares that "No action to obtain discovery under oath in aid of the prosecution or defense of another action shall be allowed; nor shall any examination of a party be had on behalf of the adverse party, except in the manner prescribed by this chapter."

The section quoted falls under the sixth chapter of the Code, the title of which is "examination of parties."

The 401st section falls under the eighth chapter, the title of which is "motions and orders," and the section itself defines what a motion is, and how and where made. It will be seen that the subject of the examination of parties is the appropriate head, and if the examination of a party to an action is absolutely prohibited on behalf of the adverse party, it would be against all legal rules of construction to infer that it might be authorized under some other section of the Code, falling under another and different title not treating of parties to an action.

The title, therefore, as well as the section 389, positively forbids any action in aid of the prosecution or defense of another action, or any examination of a party in behalf of the adverse party, "except in the manner prescribed by this chapter."

The only reason suggested that such power is given in section 401 arises from the use of the phrase, contained in the seventh subdivision, "any person." Hence it is inferred that this includes a party as well as a witness. As the title of this chapter has no reference to parties, but is limited to the general subject of "motions and orders," the phrase used must be defined to mean any witness other than a party to the action, as it clearly does both from the context and the

---

Knoeppel agt. Kings County Fire Insurance Company.

---

title. The prohibition is not violated, and the harmony of both sections is thus secured. I fully agree, therefore, with Mr. Justice BARRETT in his opinion, and have offered the above additional reasons to those given by him, and believe that his exposition is in entire accord with the policy of the law in restricting the examination of parties to an action within proper bounds.

---

Farmer agt. Robbins.

---

## SUPREME COURT.

JAMES D. FARMER agt. AUSTIN H. ROBBINS.

*Motion to discharge from arrest — laches.*

A defendant may move for his discharge from arrest, even after judgment, if within twenty days after the service of the order of arrest.

Where the defendant, residing in a foreign country, was attending as a witness, duly subpoenaed, before the referee on the trial of a cause, and after the reference was closed, and defendant about leaving for his home, he was arrested in an action, and failing to claim his personal privilege to the sheriff, and failing to demand from the county judge (who issued the order), as he had a right, to his personal privilege, but, on the contrary, acquiesced in the arrest by his silence in respect to his personal privilege, and, in addition to that, entered into the usual undertaking, and then awaited some twenty-two days before serving the motion papers for an order discharging the arrest:

*Held*, that the defendant must be held to have waived his "personal privilege" and acquiesced in the arrest. He had not been free from laches in his efforts to get rid of an arrest to which he had a valid objection, had it been taken in time.

*Oneida Special Term, October, 1872.*

MOTION to discharge an arrest under an order of arrest granted by the county judge of Herkimer, 24th September, 1872, and that day made.

The defendant was in attendance at Herkimer under a subpoena before a referee in a cause pending in this court. While waiting for the train to return to Lewis county, his residence, he was arrested, and immediately gave bail and procured his discharge. The defendant, on the twenty-sixth of September, caused a notice of retainer to be served upon plaintiff's attorney, and on the fourteenth of October obtained, by consent, an extension of time to answer. When the



---

Farmer agt. Robbins.

---

defendant was arrested he did not make any affidavit, and furnish to the sheriff in relation to his exemption from arrest, nor was one required by the sheriff as might have been under section 55 of Revised Statutes, volume 2, page 419. The papers for this motion bear date October 14, 1872, and the motion is made at the first term of the court following such arrest.

*S. Earl*, for motion.

*J. A. & A. B. Steele*, opposed.

HARDIN, *J.*—From the papers used upon this motion, the facts must be found which show that at the time of the arrest the defendant was exempt from arrest, being as he then was in attendance upon a referee under a subpoena, and being about to return to his home, having made no unnecessary delay or deviation from the proper route (2 *R. S.*, page 418, § 51). By section 54 of the 2d Revised Statutes, 419, it is provided that “every arrest of a witness, made contrary to the foregoing provisions, *shall be absolutely void*, and shall be deemed a contempt of the court issuing the subpoena.” The plaintiff had no right to have the defendant arrested at the time and place where the same took place, and the arrest was absolutely void. But it was insisted upon the argument, by the learned counsel who oppose this motion, that the defendant waived his privilege from arrest, 1. By causing a general notice of appearance to be served on the plaintiff’s attorneys. 2. By entering into bail to procure his discharge from the arrest. 3. By omitting to claim, to the officer who made the arrest, that he was privileged from arrest; and several cases decided prior to 1853 are cited in support of the position taken by the defendant’s counsel. The case of *Stewart agt. Howard* (15 *Barb.*, 26) was decided in January, 1853, and upon an appeal from an order made by justice HAND, whose decision was sustained.

When *Stewart agt. Howard* was decided, section 204 of

---

Farmer agt. Robbins.

---

the Code (then sec. 179) allowed a defendant "at any time before the justification of bail to apply on motion to vacate the order of arrest, &c.; and as the party had given bail who had justified, a motion to set aside the order of arrest was, therefore, too late, and for that reason was doubtless decided by justice HAND at special term; and the order was affirmed January, 1853, with the concurrence of HAND, J.

The case of the *Columbia Ins. Co. agt. Force* (8 How., 353) was decided in the same district in general term in May, 1853, and the opinion was delivered by justice HAND, which opinion is opposed to the dictum of WILLARD, J., in *Stewart agt. Howard* (*supra*), and being by the same district is to be treated as the better authority, inasmuch as it is later in point of time and upon points necessarily involved in the decision of the case.

By inspection of this latter case (8 How.) it will be found that the court held that executing a bond to obtain a discharge from arrest did not have the effect to waive the defendant's objections to the legality of the arrest (*Page* 354; *citing, also, J. B. Moore*, 64; 10 *id.*, 322, and 2 *D. & R.*, 73; *id.*, 237). The same learned judge adds: "That requesting and obtaining further time to answer was not a waiver of any irregularity in the arrest."

The same reason given is that now an arrest is no part of the commencement of the suit. The summons may be served and the cause put at issue before an order of arrest is obtained. The defendant in this case was liable to be served with a summons, and he was at liberty to appear and obtain the complaint, and to protect himself from the effect of the service of the summons to prevent the entry of judgment for an unfounded claim, irrespective of the questions touching his exemption from arrest.

It follows from the force proper to be given to the case in 8 *Howard*, that 15 *Barbour*, 26, is of little weight upon the question presented by the plaintiff's counsel.

The counsel for plaintiff cites *Guffing agt. Burton* (12

---

Farmer agt. Robbins.

---

*How.*, 516). That case was decided in 1856, and held that a motion could not be made to vacate an order of arrest after bail had become perfected by lapse of time (as the section read then, ten days from the time specified in the order for the return thereof) if no exception was made by the plaintiff.

In *Cady* agt. *Edmonds* (12 *How.*, 197), ALLEN, J., in 1855, held that the right to move existed until *actual justification*; and that the ten-day rule did not cut it off. That conflict was disposed of by the subsequent act of the legislature.

In 1858, section 204 of the Code was amended so as to read as follows: "A defendant arrested may, *at any time before judgment*, apply, on motion to vacate the order of arrest, and to reduce the amount of bail." Since that amendment numerous cases have held that putting in bail does not waive a party's right to question the sufficiency of the proceedings for arrest, or the validity of the order (*Knickerbocker* agt. *Ecclesien* (6 *Abbott* [*N. S.*], 9; *S. C.*, 11 *Abbott* [*N. S.*], 385).

The effect of the amendments was discussed by GOULD, J., in *Warren* agt. *Wendell* (13 *Abbott*, 187); and at page 190 he says: "it clearly provides for a case where bail has been put in." "The meaning of the present provision is that, to avoid being actually confined, a party may give bail and perfect it, and thereafter have time to make out papers, move for a vacation of the order until judgment entered." In *Barker* agt. *Wheeler* (23 *How.*, 193), MULLIN, J., delivered an opinion, based upon the amendment of 1858, and reached the conclusion that a party was given by it the right to move any time before judgment. The same learned judge holds that the Code swept away the old practice.

After the doctrine of *Barker* agt. *Wheeler* was announced, holding that a motion could be made any time *prior to judgment*, and not thereafter, section 183 of the Code was amended by the act of 1862, so as to permit a party to move any time within twenty days after the service of the order of arrest in which to answer the complaint, and to move to vacate the order of arrest.



---

Farmer agt. Robbins.

---

That section, as it now stands, must be construed in connection with section 204, and is not inconsistent with it. The effect of the amendment of 1862, of section 183, being to permit a party to move, even after judgment, if within twenty days after the service of the order of arrest (*Pelo* agt. *Clukey*, 36 *How.*, 179, *opinion* by JAMES, J.).

When the defendant was arrested he was in the village of Herkimer, where the county judge resides who granted the order of arrest, who was the referee before whom the defendant had been sworn as a witness. If the arrest was made while the reference was pending the referee could have discharged the same. If the arrest was made, as I think the affidavits establish, after the reference was closed, then the defendant could have applied to the county judge for a discharge from arrest, if the sheriff had insisted upon holding the witness after a claim by the party of his exemption from arrest (*See section 53, 2 R. S., 419*).

It therefore appears that the defendant failed to claim his personal privilege to the sheriff, and failed to demand from the county judge (who issued the order), as he had a right, to his personal privilege, and on the contrary acquiesced in the arrest by his silence in respect to his *personal privilege*, and, in addition to that, entered into the usual undertaking, and then awaited some twenty-two days before serving the motion papers for an order discharging the arrest. The opinion of BRADY, J., in *Petrie* agt. *Fitzgerald* (1 *Daly*, 401), is in point, and the reasoning applies to this case, and must be followed, and the defendant held to have waived his "personal privilege," and to have acquiesced in the arrest. He might, by application to the county judge, been discharged in ten minutes from his arrest. He has not been free from laches in his efforts to get rid of an arrest to which he had a valid objection, had it been taken in time (1 *Daly*, 401; 2 *Robertson*, 704; 15 *Barb.*, 26; 4 *Daly*, 107; 11 *Mass.*, 11 and 14).

Motion denied, with ten dollars costs.

---

People agt. Welch.

---

## N. Y. COMMON PLEAS.

THE PEOPLE agt. WILLIAM R. WELCH, surety, &amp;c.

*Error in date of recognizance — not affecting surety.*

AN error in a recognizance entered into in December, 1873, in describing the next term of the court of general sessions as one to be held on the first Monday of January, 1873, instead of 1874, was a mistake which could mislead no one, and especially not the surety. The year 1873 inserted after January might be regarded as surplusage.

*Special Term, May, 1874.*

THIS was a motion to set aside a judgment entered upon a forfeited recognizance, with ten dollars costs.

*Mr. O'Brien*, for the motion.*G. W. Lyon*, assistant district attorney, opposed.

ROBINSON, *J.*—The condition of the recognizance entered into in December, 1873, was not, as untruly sworn to by the petitioner, that the person accused should appear to answer any indictment that might be found against him on a charge of felonious assault and battery, "at a court of general sessions to be held on the first Monday of January, 1873," but was to appear at the next court of general sessions of the peace, to be held in said city and county on the first Monday of January, 1873. Petitioner's affidavit to the contrary, with the recognizance before him, was clear perjury.

The error in the recognizance entered into in December,

---

People agt. Welch.

---

1873, was in describing the next term of the court of general sessions as one to be held on the first Monday of January, 1873. The blunder in the recognizance, inserting 1873 instead of 1874, was one that could mislead no one, and to give it any such construction would be in abnegation of common sense — a technical mistake, recognizable by every one possessed of common sense, into a matter of substance. A mere casuist might claim protection from such accidental variance or omission, but no court claiming the prerogative of common sense could acquiesce in it.

VAN BRUNT, *J.* — On the 17th day of December, 1873, Abraham R. Welch became the surety for the appearance of Thomas W. Hunter at the court of general sessions.

The condition of the recognizance was: That if the above named Thomas W. Hunter should personally appear at the next court of general sessions of the peace, to be held in the said city and county on the first Monday of January, 1873, to answer any indictment, &c., then this recognizance to be void.

It is claimed that because the year 1873 was inserted that the condition of the recognizance became impossible of performance, and therefore could not be forfeited. There is no pretense that anybody was misled by the insertion of the year 1873.

The recognizance was for the appearance of Hunter at the next court of general sessions, which could only be held on the first Monday of January, 1874, and this the surety knew at the time of executing the recognizance, and undoubtedly supposed that such was its condition.

Under these circumstances the year 1873 may be regarded as surplusage.

The construction of the recognizance comes under the rule which has governed the construction of notices of trial when there has been a manifest mistake in the year, and where it is apparent that no such person was misled thereby.



---

People agt. Welch.

---

It also comes under the rule which has governed the liabilities of an indorser upon a promissory note, in which a mistake has been made in the date, whereby, upon its face, it became due before it was made; when such a note has been duly protested on the day when it was intended to become due, indorsers have always been held liable.

Motion denied.

---

Becker agt. Howard.

---

## SUPREME COURT.

ANSON U. BECKER agt. GEORGE HOWARD and BRONSON C.  
RUMSEY.

*Ejectment — tax title — wild, uncultivated lands*

Although a defendant is not in the possession of premises, the plaintiff can maintain an action of ejectment under the provisions of the statutes, basing the right upon the claim of title made by the defendant.

Where the plaintiff brings ejectment for wild and unoccupied lands, it will have to be determined upon the question who, of the parties, plaintiff or defendant, has the best title to the premises.

Where the defendants, purchasers of such premises at a comptroller's tax sale, and who took their title, the comptroller's deed, after the commencement of an action to foreclose an existing mortgage on the premises (the mortgagee never having been served with the requisite tax notice to redeem) and filing of *lis pendens*, under which foreclosure sale the plaintiff claimed title :

*Held*, that as the proceedings to enforce the collection of the tax did not stay the foreclosure proceedings, and all proper and necessary parties were named in the bill, the purchasers at the tax sale lost their title on the foreclosure sale.

The plaintiff, *prima facie*, made a sufficient title to recover as against the defendants, upon proving the patent from the state to Benjamin Chamberlain and mesne conveyances to himself.

Where the defendants rely upon the defense of proving title in another to defeat the plaintiff's recovery, they must show a present subsisting title in another. It must be one that is vital and operative, otherwise the presumption will be that it has become extinguished.

The defendants may show a prior grant by the state to another, to meet the *prima facie* case of title made out by the plaintiff, and to restrict its conclusiveness; but they must also show that the rights under such grant are vested in them.

The general rule is that the defendant in ejectment may show that the plaintiff has no title, for the plaintiff must always recover upon the strength of his own title; but this does not permit the defendant to set

Revised  
47 Nov 359  
66 200

---

Becker agt. Howard.

---

up a permanent outstanding title in a stranger, unless he can show a lawful claim and right under such party.

*Cattaraugus Circuit, May, 1874.*

AN action of ejectment tried at the Cattaraugus county circuit, without a jury, in May, 1874.

The premises are situated in the town of Bucktooth and consist of about 400 acres. They are wild and unoccupied, and uncultivated lands.

*Geo. W. Cothran*, for plaintiff.

*Franklin D. Locke*, for defendants.

BARKER, *J.* — Although the defendants are not in the possession of the premises, the plaintiff can maintain an action of ejectment under the provisions of the statutes, basing the right upon the claim of title made by the defendants.

The plaintiff founds his title upon a patent issued by this state in the year 1835 to Benjamin Chamberlain, and tracing the same through several mesne conveyances; the one to himself being a deed from Francis G. Salmon, dated April 1, 1869.

The defendants stand upon an alleged tax title from the state — the comptroller's deed — bearing date February 16, 1869; the certificate of sale bearing date November 24, 1866, the sale having taken place the same year for prior unpaid taxes.

As the case in this instance is to be determined upon the question, who of these parties have the best title, I shall first consider whether the defendants have proved in themselves any title. If they have shown any title it is necessarily an entire title to the lands, in whomsoever the same was vested at the time of the tax sale. The proceedings to levy and collect a tax upon real property are *in rem*, without inquiry or regard by the public authorities as to who is the owner.



---

Becker agt. Howard.

---

Prior to the assessment and levy of the tax upon these lands, the then owner, one Elihu J. Baldwin, on the 17th of September, 1857, executed a mortgage upon these lands to Guy C. Irvine, and the same was recorded in the Cattaraugus county clerk's office the same month.

The plaintiff's grantor claimed his title through this mortgage as a purchaser on a sale of the mortgaged premises, in an action in the supreme court to foreclose the same. A *lis pendens* was filed in that action August 16, 1868, and the deed to the purchaser is dated February 26, 1869.

Upon the trial the plaintiff gave no evidence to meet the presumption of regularity in favor of the comptroller's deed; and that must stand with the *prima facie* validity given it by section 65, chapter 427, Laws of 1855. This deed thus vested in the defendants the equity of redemption, that is, the fee of the land and the consequent right of possession.

But the comptroller's sale in nowise determined or impaired the mortgage on the premises; such lien was expressly and fully reserved by section 76 of the same act. Other sections provide for the service on the mortgagee of notice of sale by the purchaser with a view of terminating the mortgage lien, unless the mortgagee redeems the premises within the time provided. No such notice was served or attempted to be served.

The action to foreclose the mortgage being regularly begun and prosecuted according to the rules and practice of the court to a judgment and sale, the purchaser at such sale acquired the title of the mortgagor and those claiming under him who are parties to the foreclosure suit, including the defendants, who took their title after the commencement of the action and filing a *lis pendens*.

The purchaser at the tax sale must be charged with this notice, and with like effect, the same as if he had taken a deed of bargain and sale direct from the owner of the land. All persons acquiring title after the filing of a *lis pendens*, in pursuance of the rules and practice of the court, are

---

Becker agt. Howard.

---

bound by the decree the same as if they were parties defendant to the record. Clearly, if the comptroller's deed had been delivered before the foreclosure suit had been commenced, and the purchasers at the tax sale were named in that suit as defendants, they would have been cut off.

As the proceedings to enforce the collection of the tax did not stay the foreclosure proceedings, and all proper and necessary parties are named in the bill, the purchasers at the tax sale lost their title on the foreclosure sale.

As to filing *lis pendens*, and its effect on after-acquired title, see *Clark agt. Havens and others*, and note to the same, in *Clark's Chancery Reports, new edition*, page 361.

It must, then, be determined that the defendants did not show on the trial any title or right of possession to the premises. They did, however, claim title thereto, and, though not in possession, were properly made parties.

The next inquiry is, did the plaintiff prove and establish on the trial a right to recover the possession of the premises? Without now examining the chain of plaintiff's title, link by link, it is sufficient to state, preliminarily to taking up particular questions connected therewith, that *prima facie* the plaintiff made a sufficient title to recover as against these defendants, upon proving the patent from the state to Benjamin Chamberlain and mesne conveyances to himself.

Situated as the parties are in relation to each other concerning these premises, the one showing the best title is entitled to the judgment of the court.

The lands being wild and unoccupied, this action, called an action of ejectment, is to determine who of the parties to this record shall enter into actual possession under the judgment and protection of this court.

In ejectment it is a general and elementary rule that the plaintiff must recover, if he recover at all, on the strength of his own title. There are many and various qualifications to this rule, some of which will be hereafter noticed.

The learned counsel for the defendants assumed, upon the

---

Becker agt. Howard.

---

trial, that the plaintiff would be nonsuited, upon the defendants making the proof that in the year 1786 the state of New York made a concession of these lands, with others, to the state of Massachusetts; that this prior patent by the state proved title out of the state when the state made the conveyance to Chamberlain in 1835, through whom the plaintiff now claims.

Concede, for a moment, that the defendants are in a situation to prove title in another to defeat a recovery, then the fact proved is wholly insufficient to effect that purpose. When a defendant relies on a defense of this nature, he must show a *present subsisting title in another*. It must be one that is vital and operative, otherwise the presumption will be that it has become extinguished. The proof, as it is left by the defendant, must be of such a character as to make a case that the person in whom it is claimed the title is could recover, in an action of ejectment, the possession from the plaintiff, was he made a defendant, in an action by such other person (*Buller N. P.*, 1111; *Hoag agt. Hoag*, 35 *N. Y.*, 473; *Chapman agt. Delaware, L. & W. R. R. Co.*, 3 *Sandf.*, 263; *Jackson agt. Harden*, 4 *Johns.*, 211).

If there has been no entry made under such prior grant, within twenty years, it will be presumed to be extinguished. Here a period of fifty years elapsed between the first and second grant by the state. After the second grant, another period of forty years has transpired before this trial; and during all this time, now nearly a century, there has been no entry by any person claiming under a title prior to the plaintiff. A mere statement of these facts is sufficient to answer this pretension of the defendants (41 *N. Y.*, 398). Therefore, it is needless in this case to refer to the historic and traditional fact that the state, as early as the year 1819, became reinvested with the title to these lands.

The people are presumed to be the owners of all the lands within the state; and it is sufficient, in the first instance, for the plaintiff, in an ejectment suit, to show that such lands



---

Becker agt. Howard.

---

were vacant, uninclosed and unoccupied at the time of issuing the patent by the state (*People* agt. *Denison*, 17 *Wend.*, 312; *People* agt. *Van Rensselaer*, 9 *N. Y.*, 291).

A grant of land by a state is a record. All things preliminary and necessary to make it valid are presumed. It cannot be collaterally impeached; and can only be avoided and set aside by a direct proceeding, a bill or *sciera facias* (3 *Washburne on Real Estate*, 175, §§ 34, 35; *id.*, p. 179, § 40; *The People* agt. *Mauran*, 5 *Denio*, 398; *The People* agt. *Livingston*, 8 *Barb.*, 285, 297; *Brady* agt. *Begun*, 36 *Barb.*, 533).

It is not inconsistent with these propositions to hold that a defendant, to meet a *prima facie* case thus made out, to avoid it and to resist its conclusiveness, may show a prior grant by the state to another; but he must show that the rights under such grant are vested in him (*Baggs* agt. *Mercer Co.*, 14 *Cal.*, 361, 362; *Luse* agt. *Clark*, 18 *Cal.*, 535; *Waterman* agt. *Smith*, 13 *Cal.*, 419).

The general rule, as I comprehend it, is that the defendant in ejectment may show that the plaintiff has no title, for the plaintiff must always recover upon the strength of his own title. But this does not permit the defendant to set up a paramount outstanding title in a stranger, unless he can show a lawful claim and right under such party (*Cutter* agt. *Lincoln*, 3 *Cush.*, 128).

As the plaintiff does not claim under the defendants, and the defendants are not in possession, and it appears they have no valid paper title, I am satisfied that the plaintiff has shown the better title and is entitled to judgment (*Burnett* agt. *Coffee*, 14 *Cal.*, 91).

A claimant to land may have a good right to possession as against some persons, though he is not the true owner. The defendants are strangers to this title; and, as against them, the plaintiff has shown a present right of entry (*Halfred* agt. *Little*, 9 *Cush.*, 475).

Judgment should be entered in favor of plaintiff, for the recovery of possession of the premises.

---

Becker agt. Holdridge.

---

## SUPREME COURT.

ANSON U. BECKER agt. HARRISON HOLDRIDGE.

*Ejectment — tax sale — insufficient notice to redeem.*

In this action, the defendant's title failed under the tax sale and proceedings, for the reason that the *notice* required to be published by the comptroller, in pursuance of section 61, chapter 425, Laws of 1855, is defective in not stating, as required by the act, that "unless such lands are redeemed by a certain day they will be conveyed to the purchaser."

The notice, as published, states that "the payment into the treasury of this state of the sum set opposite to each lot, piece or parcel of land will be required to redeem the same, respectively, at the expiration of the time for the redemption thereof, which will be on the 28th day of November, 1861."

The proof on the question whether the title was out of the state when it gave its patent to Benjamin Chamberlain, in 1835, *held* to be much stronger in favor of the plaintiff that the state had become reinvested, than in the preceding case of *Becker agt. Howard* (*ante*, p. 423), just decided.

The proof is presented and relied upon by the defendant in an action of ejectment, who is out of possession and without title to defeat a recovery by one who connects himself with the last grant by the state. The fact of a prior grant by the state is wholly unavailing to the defendant for the reason that he does not connect himself with such prior grant.

*Cattaraugus Circuit, May, 1874.*

ACTION of ejectment to recover possession of lot thirty-five, township one, range seven, in the town of Salamanca, late Bucktooth, in the county of Cattaraugus, tried at the Cattaraugus circuit, May 18, 1874, before the court, without a jury.

The only facts necessary to be stated, in addition to those stated or referred to in the opinion, are that the defense was based upon a deed from the comptroller of this state of the

---

Becker agt. Holdridge.

---

premises in controversy, pursuant to a sale thereof by said comptroller for unpaid taxes.

The notice to redeem, as published by the comptroller, was in these words:

“COMPTROLLER’S OFFICE,  
“ALBANY, *March* 20, 1861. }

“Notice is hereby given, pursuant to title two, chapter 427, of the Laws of 1855, that at the sale above mentioned, which closed on the 28th day of November, 1859, the following described lots, pieces and parcels of land, situate in the county of Cattaraugus, were sold for arrears of taxes due thereon, and which remain unredeemed; and that the payment into the treasury of this state of the sum set opposite to each lot, piece or parcel of land, will be required to redeem the same, respectively, at the expiration of the time for the redemption thereof, which will be on the 28th day of November, 1861.

“ROBERT DENNISTON,  
“*Comptroller.*”

*Geo. W. Cothran*, for plaintiff.

*D. H. Bolles*, for defendant.

BARKER, *J.*—In the case of this same plaintiff against George Howard and another, tried at the same term, and just decided, the plaintiff’s title is the same as in this action. The defendant’s claim of title in that, as in this action, is a tax title, and in the main the questions of law and fact are identical. Reference is made to the opinion prepared in that case for the views of the court on such questions as are applicable to this.

The defendant’s title failed under the tax proceedings, for the reason that the notice required to be published by the comptroller, in pursuance of section 61, chapter 425, Laws of 1855, is defective. This section requires the notice to state, that unless such lands are redeemed by a certain day they will



---

Becker agt. Holdridge.

---

be conveyed to the purchaser. The notice published does not so state specifically. By no fair construction can it be so held. It would require a most liberal construction to uphold the notice as a sufficient compliance with the statute. The intention of the legislature doubtless was, that this last step in the proceedings, to take the title of the owner, should be to him a fair and plain notice that, unless he redeemed on or before the day named, a conveyance of the land would be made to the purchaser. There is no such information contained in the notice—not the faintest. If a proprietor of lands was told that unless he redeemed by a fixed day a deed of his lands would be made out and delivered to another, the dullest of men would comprehend that his title would be gone. To say to him only that he must redeem by a day named, stating the sum required to be paid, would leave it open to conjecture and inquiry, what the effect not to redeem would have upon his property. A person, to know the full legal effect, would have to be informed concerning the tax laws and all their provisions. Such laws are necessarily positive in their nature, and the mere judgment of an individual, without an accurate recollection of the reading of the statute, would be an unsafe guide to follow.

The notice is certainly not a strict compliance with the law, and in my opinion it is not even a substantial compliance.

Upon the question whether the title was out of the state when it gave its patent to Benjamin Chamberlain in 1835, the proof is much stronger in favor of the plaintiff, that the state had become reinvested than in the other case just decided. Here the evidence is, that a person assuming to have authority from the true owner did convey to the state. Following the making and delivery of the deed, the legislative branch of the government, by enactment, consent to receive the grant (*chapter 226, Laws 1819, page 301*), and thereafter the executive department, in pursuance of general laws, for a consideration paid it by a citizen, alienated the

---

Becker agt. Holdridge.

---

land to him as a part of the public domain. For over fifty years following the grant to the state, no claim is made by the grantor that Paul Busti, who acted as their agent, had no power to convey. No one for them, or claiming title or interest under them, now make the least claim. This proof is presented and relied upon by a defendant in an action of ejectment, who is out of possession and without title, to defeat a recovery by one who connects himself with the last grant by the state. The fact of a prior conveyance by the state is wholly unavailing to the defendant, for the reason that he does not connect himself with such prior grant.

The plaintiff's grantor had a deed of those lands made and executed by an officer of this court, under the decree of the court in an action where the person then owning the premises named as a defendant, the sale to him being in compliance with such decree. While the plaintiff must recover on the strength of his own title, it is sufficient, to determine this action in his favor, that he has at least this title, and the defendant has none.

Judgment for plaintiff.

---

Boyd agt. De La Montaigne.

---

## SUPREME COURT.

WILLIAM L. BOYD, executor, &c., appellant, agt. JOHN DE LA MONTAIGNE, respondent.

*Acts done under a mistake of fact — relievable in equity — between husband and wife.*

Under the well settled principles of equity which declare an act invalid, both upon the ground of mistake and fraud, the general rule in equity, that an act done or contract made, under a mistake or in ignorance of a material fact, will be applied voiding or relieving it.

Where an assignment of a leasehold estate is made by the wife to her husband, upon misrepresentation of material facts, made by the husband to her, although the husband did not then know such representation to be untrue, the court will interpose in equity and pronounce the transaction void.

The confidential relations existing between the parties at the time entitled the wife to be relieved from the consequences of the transfer made of her estate, although the leading motive inducing it was improper and unlawful. She acted under the influence of the misrepresentations made to her by and through the agency of her husband.

The law will not permit him to profit by an apparent advantage secured in that way, because it regards her, under the circumstances, as acting under his controlling and governing influence.

*First Department, General Term, May, 1874.*

APPEAL from judgment recovered on trial before the court at special term.

*Augustus F. Smith*, for appellant.

*E. W. Stoughton*, for respondent.

DANIELS, J.—This action was brought by Caroline De La Montaigne, the defendant's wife, to annul the assignments made



---

Boyd agt. De La Montaigne.

---

of a leasehold estate by her to A. Oakey Hall, and from him to the defendant. She intermarried with the defendant in December, 1847, and they lived together as husband and wife until the year 1860. No formal separation then or afterward took place, but it is plain from the evidence that the preceding ardor of his affection for his wife after that time very sensibly declined until the present action was commenced, in 1867. Since that time, their relations were hostile and unfriendly up to the time of her decease, which occurred after the recovery of the judgment and taking the appeal in this action. According to her letters, forming a portion of the case, she continued to regard the defendant with affection and esteem, up to the year 1866.

On the 23d day of September, 1851, the assignments of the leasehold estate were executed, which it was the primary object of this action to annul and set aside. After that time the lease was renewed to the defendant, and he has received and enjoyed the rents and profits of the premises ever since the assignments were made. They were each made for the nominal consideration of one dollar, and constituted a gift of the estate by the wife to her husband. The learned judge presiding at the trial found that the gift proceeded from the love and affection which she entertained for her husband; but the statement that such was the consideration, either wholly or partially, the evidence showed, and the judge found, was omitted from the assignments by the express direction of the wife herself.

Before the assignments were made the relations existing between herself and her husband were very affectionate and confiding in their character; and there is nothing in the evidence from which it can be inferred that there was the least simulation in that respect on the part of the husband. It was claimed that the subsequent subsidence of his affection warranted, and indeed required, such an inference. But as that seems to have happened quite a number of years after the assignments of the estate, no such conclusion can properly be

---

Boyd agt. De La Montaigne.

---

drawn from that circumstance. There is nothing in the case, involving the genuineness of his affection for her, in doubt at the time when the estate was assigned, or for several years after that time. Before the assignments of the leasehold estate she made a will devising that estate to her husband, and then designed he should receive it in that way. And both her own evidence and that given by the defendant, as witnesses in the case, contain no indication that she intended he should become the recipient of the estate in any other way until near the time when the assignments were made. And if no change had been produced through the agency of the defendant in her intentions, there is no reason for supposing that he would ever have received the title to the estate in any other way. For that reason it is probable that their subsequent estrangement would have deprived him of the estate altogether, if his only chance of receiving it had been confined to the will of his wife; for after such an event she not only probably would, but actually did, change her will so as to give what property she had the power to dispose of an entirely different direction. It may, therefore, be safely and properly assumed that if the husband had not received the estate as he did, that he probably would never have received it at all; for no other circumstance arose after the assignments were made from which it can be inferred she would have voluntarily parted with it in his favor. And she seems to have been restrained by fear of the censure of her friends from disposing of it in his favor during the period of her life without the existence of some cogent reason requiring that to be done. They had opposed her marriage, and as the defendant was nearly twenty years younger than herself, they seem to have suspected that her property was the motive leading to it upon the part of the defendant. And she seemed anxious to avoid what might confirm the propriety of that suspicion. It is highly probable, therefore, that the defendant never would have received the title to the estate, if that had not been acquired by means of the assignments.

---

Boyd agt. De La Montaigne.

---

For that reason the validity of his title must depend upon the circumstances whether they can be equitably maintained against the claim which was made to the estate by his wife.

The evidence showed, and the judge found the fact as proved, that in May, 1850, the defendant, while in the state of California, bought two shares in the steamer called Gold Hunter, and paid the purchase-price partly by money sent him by his wife and partly by money supplied by himself. The contract of purchase was taken in his own name and for his own account, but the title, so far as it was taken, was transferred in the name of his wife. By August of that year the adventure in which the steamer was engaged proved to be a failure, and debts existed against the persons engaged in it to a considerable amount; but the defendant's wife was not liable for their payment, either directly or by means of their being chargeable upon the property owned by her. The defendant, however, exhibited a letter to her from his brother, who thought an attempt would be made to collect the debts from her, and containing the expression of apprehension upon that subject; and the defendant himself also expressed his opinion or apprehension to her that she and her property were liable for the payment of those debts.

These seem to have been her only sources of information upon the subject of the liability of herself and her property for the payment of those debts; and from what was communicated to her in that manner, she believed that herself and her property were liable for the payment of such debts, and that if she assigned the lease to the defendant it would be more secure in his hands than her own, and might, at least, delay the creditors; and she executed the assignment made by her under that belief. That conviction seems to have changed her purpose as to the time of transferring the lease, and induced her to do so by means of the assignments, instead of leaving her purpose, that her husband should ultimately have the lease, dependent upon the provision made by her will. These facts are sustained by the evidence, and in



---

Boyd agt. De La Montaigne.

---

substance were found by the judge before whom the trial was had. Besides that, in 1860, she asked the defendant for a reassignment of the lease, or to assign her the renewal of the term taken by him; and he promised to comply with the request, but stated that he would take his own time for it. This circumstance is not entirely consistent with the conclusion that by the transfer it was designed that the defendant should become the absolute owner of the estate. For if that had been the intention he would have insisted upon his title, instead of promising the surrender or return of it again to his wife. But it is not necessary, in the disposition of the case, to determine which conclusion is the most probable; for it very clearly appears that she was induced to part with the title to the estate by means of the conviction produced in her mind, by the representations made to her, that both herself and her property were liable for the debts contracted in the adventure of the "Gold Hunter;" and that by making the assignments she hoped to delay and embarrass the creditors, and perhaps save her property. This purpose was not expressed to the counsel who drew the assignments, and it was not necessary that it should be, as long as its existence and the representations producing it so clearly appear from the evidence of the parties themselves—and both have been found as facts by the judge.

These representations were untrue, and they produced a false impression in the mind of the wife, inducing her to part with an estate which she would have otherwise continued to own until after all disposition to bestow it upon the defendant had ceased to exist. And that, under the well settled principles of equity, was sufficient to render the assignments invalid, both upon the ground of mistake and fraud. The general rules upon that subject are, that "an act done, or contract made, under a mistake or ignorance of a material fact, is voidable and relievable in equity" (1 *Story's Equity*, 9th ed., § 140). "The fact may be unknown to both parties or it may be known to one party and unknown to the other.

---

Boyd agt. De La Montaigne.

---

In the latter case it will sometimes afford a solid ground for relief, as where it operates as a surprise or fraud upon the other party. But in all such cases the ground of relief is not the mistake or ignorance of material facts alone, but the unconscientious advantage taken of the party by the concealment of them" (*Id.*, § 147).

It was not found that the defendant knew the representations made by him to his wife to be untrue. But, where such a relation exists as did between these parties, that is not necessary to constitute a fraud which courts of equity will relieve parties from the consequences of; for in equity fraud may be committed by "acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed," which are injurious to another, "or by which an undue and unconscientious advantage is taken of another" (*Id.*, § 187). Where the relations of attorney and client, guardian and ward, principal and agent, husband and wife, and other similar confidential cases exist, "the law, in order to prevent undue advantage from the unlimited confidence, affection or sense of duty which the relation naturally creates, requires the utmost degree of good faith in all transactions between the parties. If there is any misrepresentation or any concealment of a material fact, or any just suspicion of artifice or undue influence, courts of equity will interpose and pronounce the transaction void, and, as far as possible, restore the parties to their original rights" (*Id.*, § 218; *Sears agt. Shafer*, 2 *Seld.*, 268, 272; *Jaques agt. Methodist Church, &c.*, 17 *John.*, 548; *Fry agt. Fry*, 7 *Paige*, 461).

The facts proved and found clearly bring the present case within these principles; and, from the confidential relations existing between the parties at the time, entitled the wife to be relieved from the consequences of the transfer made by her of her estate, although the leading motive inducing it was improper and unlawful. She acted under the influence of the misrepresentations made to her by and through the

---

Boyd agt. De La Montaigne.

---

agency of the defendant as her husband. And as she then confided fully in his statements, it was perfectly natural that she should yield her property to what was then regarded as the chance of its only safety. The law will not permit him to profit by an apparent advantage secured in that way, because it regards her, under the circumstances shown, as acting under his controlling and governing influence.

Under this presumption, a client has been relieved from the effect of his act, in transferring his property to his attorney, in order to avoid the rights of his creditors; and that was done for the reason that the relations existing between the parties required the application of the general equitable principles already mentioned (*Ford agt. Harrington*, 16 *N. Y.*, 285). The present case is within the spirit of that authority. Instead of being denied relief, the facts proved required that judgment should be pronounced in favor of the wife.

The statute of limitations was not applicable to the case, because of the coverture of the plaintiff, and the continued absence of the defendant from the state. No facts were found, and the evidence proved none, rendering that defense a proper one.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

DAVIS, P. J., and BRADY, J., concurred.



---

Williams agt. Irving.

---

## SUPREME COURT.

JOSEPH WILLIAMS agt. JAMES IRVING.

*Settlement of a judgment — by agreement to take a less sum.*

It has long been settled that a plea of the payment of a less sum than is admitted to be due, cannot be held good as an accord and satisfaction. And the payment of a lesser sum than is admitted to be due does not preclude a recovery of the balance, though the payment is evidenced by a receipt expressing payment to be made in full of all demands.

But, if there has been a *bona fide* dispute between the parties as to their rights, and they agree upon a sum to be paid, and the same is paid, this will bind the parties; not, however, upon the principle of accord and satisfaction, but upon the principle that the parties have ascertained their rights and effected a settlement upon the basis of such rights.

Where the judgment of over \$14,000, taken by default against the defendant, having stood for over eight years, when defendant was brought up on an order for examination in favor of the plaintiff, and an interview was had between the parties, and a dispute about the judgment, the defendant denied that he owed the plaintiff a cent; that if any such judgment was recovered, it was "a snap judgment and a fraud;" the plaintiff asserted the contrary, and, after such dispute, the defendant stated that rather than have any controversy or further dispute as to such judgment, or any demands of the plaintiff, he would pay the plaintiff \$1,000, and plaintiff finally consented to accept "said \$1,000 in settlement, satisfaction and discharge of the judgment and all demands."

*Held*, the evidence being overwhelming in favor of the defendant of such facts, that this was a compromise, and the agreement seemed to have been deliberately made, and the money accepted by the plaintiff for peace; hence the defendant was entitled to an order setting aside the supplementary proceedings, and declaring the judgment discharged, and that the same has been compromised and settled.

*New York Special Term, February, 1873.*

MOTION by the defendant to be relieved from a judgment of \$14,449.11, entered in favor of plaintiff July 19, 1862.

---

Williams agt. Irving

---

Upon the 29th of January, 1873, justice BURRETT granted an order for the defendant to appear and be examined.

The defendant in his affidavit alleges that he and the plaintiff in June, 1870, at the Astor House, had an interview, in which the plaintiff asserted he had recovered a judgment for \$14,000 against the defendant. That the defendant *denied* it; avowed he did not owe the plaintiff a cent; that if any such judgment was ever obtained it "was a snap judgment and a fraud." That, after such dispute, the defendant, in said interview, stated that rather than have any controversy or further dispute, as to such judgment or any demands of the plaintiff, he would pay the plaintiff \$1,000, and that the plaintiff finally consented to accept "said \$1,000 in settlement, satisfaction and discharge of the judgment and all demands."

The affidavit of the defendant is supported by that of James Brown, Marcus Hanlon, John W. Irving, fully sustaining the defendant, as to the interview and what took place there between the parties as to the dispute and payment of the \$1,000. The plaintiff's affidavit denies the statement in respect to said interview and payment; also, states the recovery of the judgment and the consideration thereof. There is also produced an affidavit of the person who served the summons, upon which the judgment was entered by default; and it is stated in behalf of the plaintiff, that in 1868 he became bankrupt, and that the judgment passed to his assignee who assigned it to Harvey C. Williams, *the son* of the plaintiff.

There is no proof of *any notice* to the defendant of either of said assignments.

*Garvin, Fellows & Brooke*, for motion.

*Thos. Stevenson*, for plaintiff opposed.

HARDIN, J. — The proof is so overwhelmingly in favor of the defendant's version of the alleged interview at the Astor

---

Williams agt. Irving.

---

House in June, 1870, that it must be accepted and acted upon in disposing of this motion.

The counsel of the plaintiff was so far moved by it as to admit his willingness to credit the \$1,000 alleged to have been paid upon the judgment, but insisted, as a matter of law, that no greater effect could be given to the facts stated in the moving papers.

The learned counsel for the plaintiff argues that the defendant is not at liberty to insist that the payment of a thousand dollars is good defense to any further claim upon the judgment, and to have the same held good as an accord and satisfaction.

His position is borne out by the case of *Mitchell* agt. *Hawley* (4 *Denio*, 414), so far as the counsel insists that it is not technically a good "accord and satisfaction" by the obiter parts of the opinion in that case.

Nor could such payment and the agreement made upon receiving it operate by way of a release. There was no writing under seal, and, therefore, no technical release.

It has long been settled that a plea of the payment of a less sum than is admitted to be due cannot be held good as an accord and satisfaction (*Walkinson* agt. *Inglesby*, 5 *John. R.*, 390; *Strang* agt. *Holmes*, 7 *Cowen*, 224; *Palmerston* agt. *Heaford*, 4 *Denio*, 166; *Stewart* agt. *Ahrenfeldt*, 4 *Denio*, 189; *Taylor* agt. *Nussbaum*, *Duer*, 309; *Ryan* agt. *Ward*, 48 *N. Y.*, 204; *Bunge* agt. *Koop*, 48 *N. Y.*, 225).

In *Ryan* agt. *Ward* (*supra*) it was held that the payment of a lesser sum than was admitted to be due does not preclude a recovery of the balance, though the payment was evidenced by a receipt expressing payment to have been made in full of all demands.

In *Foresch* agt. *Blackwell* (14 *Barb.*, 608) judge MARVIN quotes the principle already stated, and adds: "The contract to accept a part performance does not rest upon a good



---

Williams agt. Irving.

---

consideration. The debtor was already bound to do all and more than he was to do, and did do under the new contract."

If there was a *bona fide* dispute between the parties as to their rights, and they agree upon a sum to be paid, and the sum is paid, this will bind the parties; not, however, upon the principle of accord and satisfaction, but upon the principle that the parties "*have ascertained* their rights and effected a settlement upon the basis of such right" (4 *Denio*, 166; 14 *Barb.*, 609).

In order to uphold such an agreement there must exist some doubt or dispute in respect to the demand which is the subject of the agreement (*Dolcher agt. Fry*, 37 *Barb.*, 158-159).

BOCKES, J., in *Farmers' Bank agt. Blair* (44 *Barb.*, 652), says: "In such case it is not admissible to go behind the compromise with a view to determine which of the parties was right. Compromises are to be encouraged because they promote peace; and where there is no fraud, and the parties meet upon equal terms, and *adjust* their differences, the court will not overlook the compromise, but will hold the parties concluded by the settlement."

In this case, the judgment had been taken upon a default, and had stood eight years, and the defendant disputed the existence thereof, and insisted that he did not owe the plaintiff a cent, and that if any such judgment existed, "it was a snap judgment and a fraud;" and although the plaintiff maintained in the dispute the contrary, he finally acquiesced in the offer of the defendant, and concluded to accept and did accept \$1,000, to avoid further controversy, and then and there deliberately agreed with the defendant to compromise. The agreement seems to have been deliberately made for peace, and certainly, taking as true the defendant's statement, the money was paid to produce a settlement (25 *Barb.*, 253).

There was doubt, dispute, a peace offering, under a promise to accept it in discharge of all demands, in discharge of the judgment herein. The acceptance, under the agreement, was

---

Williams agt. Irving.

---

essential to give full effect to the payment of the money. The *acceptance wanting*, the agreement would be inoperative (*Tillou* agt. *Olcott*, 16 *Barb.*, 598).

The agreement to receive, the paying, and the acceptance in full compromise of the judgment, stand established here by the defendant's proofs, and effect must be given to them (*Keeler* agt. *Salisbury*, 33 *N. Y.*, 648).

It was claimed that the settlement of June, 1870, should not be held good against the present owner of the judgment.

But it appears that the assignment by the plaintiff to his assignee, and by him to the plaintiff's son, the present owner of the judgment, was not known to the defendant. There is no *notice* shown to have been given to the defendant, and he was, therefore, justified in paying or compromising with the plaintiff (*Gibson* agt. *Haggerty*, 37 *N. Y.*, 555).

A judgment is a thing in action, and is, therefore, controlled by section 112 of the Code, which provides that the action by an assignee of a thing in action shall be without prejudice to any defense resting before notice of the assignment. If instead of the proceedings supplemental to execution the son had brought an action on this judgment, the defense might be interposed; but the supplementary proceedings are in the nature of an action in equity, or of a creditor's bill, to enforce the judgment.

But, before the Code, payments upon judgments to the plaintiff, made before *notice of the assignment*, were good and effectual (*Wardell* agt. *Eden*, 2 *Johnson's Cases*, note A, p. 258; *Laughlin* agt. *Fairbanks*, 8 *Miss.*, 367; *Lampson* agt. *Fletcher*, 1 *Vermont*, 168).

KENT, J., says, in *Wardell* agt. *Eden* (*supra*), "but until the defendant has *notice* of the assignment, all payments made by him and all acts of the plaintiff as to him are good" (1 *Term*, 616; 4 *Term R.*, 340; 1 *John. Cases*, 411; in the *July term* of 1800, *A. D.*).

Special notice of the assignment is unnecessary, if there

---

Williams agt. Irving.

---

are facts shown sufficient to put a party upon inquiry (*Andrews agt. Beecker*, 1 *John. Cases*, 411).

In this case there are no facts shown to put the defendant upon inquiry. The settlement and payment and compromise of June, 1870, are as conclusive upon the owner of the judgment as upon the plaintiff, so far as the defendant is concerned (*Huntington agt. Potter*, 32 *Barb.*, 304).

Under the prayer for such further and other relief contained in the motion papers, the defendant is entitled to an order for such relief as the facts presented on the motion warrant (*Thompson agt. Erie R. R. Co.*, 45 *N. Y.*, 476; *People agt. Nostrand*, 46 *N. Y.*, 377).

An order may be entered setting aside the supplementary proceedings, and declaring the judgment discharged, and that the same has been compromised and settled.



---

Kendall agt. Miller.

---

## SUPREME COURT.

ABBY KENDALL agt. MARIETTA MILLER and others.

*Devise by will — of a farm — construction of clause.*

The testator, father of the defendant, by his will devised to Marietta Miller "the farm on which John Fox now lives, \* \* \* bounded easterly and westerly by lands owned by M. D. Hall."

John Fox then occupied, under a written agreement with the testator, about one hundred and forty-one acres of land, composed of three several pieces or purchases, containing, in round numbers, one hundred, eighteen, and twenty-three acres, respectively. The lot of eighteen acres, lying between the others, bounded northerly by the hundred acres, on the south-easterly corner by the twenty-three acres, which is a long narrow strip extending to the south. A small portion only of each of the two smaller lots were cultivated and used with the one hundred acres; the remainder was wood-land. The one hundred acres upon which John Fox resided contained all the buildings. Fox maintained the fences around all the lots.

The question was whether the devise included only the one hundred acres, or the three parcels. *Held*, that under the circumstances surrounding the testator at the time, he undoubtedly intended to and did devise all the land used and occupied by John Fox to his daughter Marietta Miller, the defendant, and that no portion of the one hundred and forty-one acres could be partitioned in this action.

*Chemung Special Term, April 21, 1874.*

ACTION to partition several different parcels of land. The defendant, Marietta Miller, set up in her answer the exclusive title to two of the parcels, under the last will and testament of her deceased father. The plaintiff and the other defendants contended that title to the parcels in question did not pass under the terms of the devise. This was the only

---

Kendall agt. Miller.

---

question in the case. The other facts are sufficiently set forth in the opinion of the court.

*S. L. Rood*, for plaintiff.

*M. J. Sunderlin*, for defendant, Marietta Miller.

*B. W. Woodward*, for the other defendants.

COUNTRYMAN, *J.*—There is only one question presented for consideration, which is, the true construction to be given of the clause in the will devising to Marietta Miller “the farm on which John Fox now lives, \* \* \* bounded eastwardly and westwardly by lands owned by M. D. Hall.”

It appears from the evidence that John Fox then occupied, under a written agreement with the testator, about 141 acres of land, composed of three several parcels or purchases, containing, in round numbers, one hundred, eighteen, and twenty-three acres, respectively. The lot of eighteen acres lies between the others, bounded northerly by the hundred acres, and on the south-easterly corner by the twenty-three acres, which is a long and narrow strip extending to the south. The testator was also the owner of several hundred acres of other land, but none of it adjoined or was in the immediate vicinity of the lots in question. The principal portions of the two smaller lots were wood-land, though a few acres of each had been cultivated, and larger portions were used in connection with the main parcel of 100 acres (on which John Fox resided, and all the buildings were located) for mowing grass and pasturing the farm stock. Fox also maintained the fences around all the lots. M. D. Hall owned land lying along the entire easterly line of the eighteen and the hundred-acre lots, and he also owned land lying along nearly the entire westerly line of the hundred acres, and the greater portion of the westerly line of the eighteen acres; but he owned no land which bounded or adjoined any portion of

---

Kendall agt. Miller.

---

the twenty-three acres. The precise question is, whether the devise only included the 100 acres on which John Fox *resided*, or the 118 acres *bounded* eastwardly and westwardly by the lands of M. D. Hall, or the entire three parcels of 141 acres which John Fox *occupied*.

The subject of the devise is "the farm," and whatever may properly pass under that designation; and the rest of the language used by the testator is merely for the purpose of identity or description. According to Blackstone, "farm, or feorme, is an old Saxon word signifying provisions; and it came to be used instead of rent, or render, because anciently the greater part of rents was received in provisions—in corn, in poultry, and the like—till the use of money became more frequent; so that a farmer, firmarius, was one who held his lands upon payment of a rent, or feorme; though at present, by a gradual departure from the original sense, the word farm is brought to signify the very estate or lands so held upon farm, or rent" (2 *Black. Com.*, 318). In more modern times the word farm has received a still more extended signification, and now denotes, in this country, both in a popular and legal sense, a considerable tract of land, devoted, in part at least, to cultivation, with suitable buildings, and under the supervision of a single occupant, regardless of the nature or extent of his tenure (1 *Burrill's Law Dic.*, 605, *title FARM, and cases cited*). Any considerable tract, or a number of smaller tracts of land, set apart for cultivation by a single occupant, whether as a tenant or owner, and upon which he resides, even though disconnected and separated by the lands of adjoining owners, if used together, would be regarded as constituting a single farm; and, if sufficiently identified, the whole would undoubtedly pass under the word "farm," in a testamentary devise (*Goodtitle agt. Southern*, 1 *Maule & Sel.*; 299; *Goodtitle agt. Paul*, 2 *Burr.*, 1089; *Jackson agt. White*, 8 *Johns.*, 59). When, therefore, the testator purchased the several parcels of land in question and united them under the occupation and control of one person, they clearly became, in



---

Kendall agt. Miller.

---

the language of the country, a single farm; and in afterward designating the land thus occupied as a farm and referring to it under the name of the occupant, the owner must have intended, and would be commonly understood to include, all three of the original parcels.

The subject of the devise is identified in the will as "the farm on which John Fox now *lives*." There is no force in the suggestion that this language merely refers to the main parcel of 100 acres on which the buildings are located, and where he therefore resides, even if we restrict the meaning of the word "lives" and consider it as only equivalent to "dwells," or "resides," because each of the lots is a part of the farm; and when the occupant is referred to as living, or dwelling, or residing on the farm, they are all necessarily included and referred to under that designation. But I apprehend that the word "lives" was really used by the testator in the more general sense of "subsisting," or "obtaining a livelihood," on the farm; and while a more restricted meaning would not be inconsistent with, this extended signification would serve to strengthen the view or construction already adopted, as John Fox, in fact, occupied and obtained his livelihood from all the lots, as one farm.

The testator, however, was not content to identify the subject of the devise, but, by way of additional description, referred to the farm as "bounded eastwardly and westwardly by lands owned by M. D. Hall." This description would not sustain either construction contended for on the argument. It would neither limit the farm, as devised, to the main parcel, nor include the twenty-three acres, but would clearly embrace the two northerly lots, containing, together, 118 acres. This reference to the boundaries of the farm—if entitled to any weight—clearly demonstrates that the testator did not intend to limit the gift or devise to the main lot, on which John Fox then resided. But the subject of the devise, when clearly identified in the will, is never limited or controlled by any additional description which turns out to

---

Kendall agt. Miller.

---

be erroneous. Where the intention of the testator is apparent and the subject of the gift can be clearly ascertained, any additional description, not inserted as an evident restriction or limitation of the devise, which is found to be erroneous, will be rejected as surplusage (*Doe* agt. *Roe*, 1 *Wend.*, 541; *Van Kleeck* agt. *Dutch Church of New York*, 20 *Wend.*, 492-494, 503-506; *Goodtitle* agt. *Paul*, 2 *Burr.*, 1089; *Woods* agt. *Moore*, 4 *Sanf. Sup. C. R.*, 579).

Keeping in view the canons of interpretation which obtain in the construction of these instruments, and reading the language of this will in the light of the circumstances surrounding the testator at the time, I am led to the conclusion that he intended to and did devise all the land used and occupied by John Fox to his daughter, the defendant, Marietta Miller. It follows, that no portion of the 141 acres of land can be partitioned in this action.

Judgment accordingly.

---

Fisher agt. World Mutual Life Insurance Co.

---

*Distinguished  
60 How 87*

## SUPREME COURT.

JAMES W. FISHER agt. THE WORLD MUTUAL LIFE INSURANCE  
COMPANY.

*Injunction and receiver—against a life insurance company—not granted.*

Where the object and scope of the plaintiff's complaint (he being a stockholder) are the forfeiture of all the corporate rights of the defendant—a life insurance company formed under the general law of 1853—and an injunction asked for which will suspend its operations, under and by virtue of the thirty-ninth, fortieth and forty-first sections of 2d Revised Statutes, 484, Edmonds' edition, for violation of duty in making annual statements and other irregularities under its charter, it will be held bad on demurrer.

The exception contained in section 11 of the act of 1853 expressly excludes the application of the Revised Statutes to the violations of the act of 1853.

The remedy for any supposed violation, including such as the plaintiff alleges, is to be found under the act of 1853. That is the exclusive remedy in respect to annual statements, and in respect to every violation of the act.

*New York Special Term, March, 1873.*

DEMURRER by the defendant to the complaint.

*F. Culver*, for plaintiff.

*W. P. Prentice*, for defendant.

HARDIN, J.—The plaintiff, by his complaint, asks an injunction restraining all the corporate acts and business of the defendant, and the appointment of a receiver of its effects, “to collect, sue for and recover the debts and demands that may be due.”



---

Fisher agt. World Mutual Life Insurance Co.

---

The scope and object of the bill are aimed at a forfeiture of all the corporate rights of the defendant, and an injunction is asked for, which will suspend its operations.

It was settled by ample authority in this state, prior to April 21, 1825, that the court of chancery possessed no such power or right of interference with corporations (*The Attorney-General agt. The Utica Ins. Co.*, 2 *Johnson's Ch. R.*, 371, *opinion by KENT, chancellor*; *Attorney-General agt. The Bank of Niagara*, 1 *Hopkins*, 354, *opinion by SANDFORD, chancellor*).

The last case was decided in March, 1825, and following its announcement came the act of the legislature of the 21st of April, 1825, which was adopted and incorporated substantially into the Revised Statutes, and is now found in thirty-ninth, fortieth and forty-first sections, in Edmonds' edition, 2 Revised Statutes, page 484.

The first case which was decided under the act of 1825 was that of the *Attorney-General agt. The Bank of Chenango* (1 *Hopkins*, 598); and in delivering the opinion in that case, chancellor SANDFORD took occasion to refer to the antecedent cases, and to declare that the *new power* granted by the act of 1825 was invoked and applicable. Following that case was *Verplanck agt. The Mercantile Insurance Co.*

The vice-chancellor granted, *ex parte*, an injunction, and appointed a receiver, and an appeal was taken to the chancellor, and the injunction was dissolved and the receiver discharged in June, 1831; and the case was remitted back to the vice-chancellor of the first circuit, with permission to the complainants to apply to him for leave to amend their bill, so as to make the corporation defendant (2 *Paige Reports*, 452).

In July, 1831, before the vice-chancellor (of the first circuit), the complainants presented a petition for leave to amend their bill (1 *Eds. Ch. R.*, 46, 47 and 48).

The vice-chancellor allowed an amendment, by inserting the corporate name of the Mercantile Insurance Company in the place of the president and directors.

---

Fisher agt. World Mutual Life Insurance Co.

---

The complainants having so amended their bill, in August, 1831, a motion was made by them, as *stockholders*, for an injunction to restrain the further operations of the company, and for the appointment of a receiver.

In the opinion of vice-chancellor McCoun the antecedent cases were referred to, denying the power of the court of chancery to interfere in such cases, prior to the act of 1825, under the *general equity* powers of the court, and the power of the court to superintend and exercise *visitorial powers* over corporations was declared to depend upon the thirty-ninth, fortieth, forty-first and forty-second sections of the Revised Statutes referred to (*supra*).

The Mercantile Insurance Company was not insolvent, and, therefore, the question to be examined was wholly dependent upon the alleged violation of the *act* of incorporation, or the violation of any other act of the legislature, binding upon said company.

The conclusion is reached then, that when the directors are alleged to have fraudulently dealt with the funds of the company, the remedy is not against the company in its corporate character, but against the directors by whom the fraud is committed (1 *Edwards*, 94).

It is approved in *Robertson agt. Bullions* (9 *Barb.*, 100, and 4 *Abbott [N. S.]*, 107).

From the foregoing reference to the origin of the thirty-ninth, fortieth and forty-first sections of the Revised Statutes, and the authorities quoted, it will be seen that the right of the plaintiff in this case depends, as was supposed by his learned counsel, and stated in the argument, upon the sections quoted.

When these sections were passed by the legislature there was no general law in this state authorizing the formation of insurance companies.

After the adoption of the constitution of 1846, the first general law, authorizing the formation of such companies, was passed in 1849, April 10th.

---

Fisher agt. World Mutual Life Insurance Co.

---

That act was followed by an act of the legislature of 1851, amending the act of 1849.

Then came the act of 1853, chapter 463, entitled "An act to provide for the incorporation of life and health insurance companies, and in relation to agencies of such companies." The act of 1853, by its twenty-second section, expressly repealed so much of the acts of 1849 and 1851 as relate to life insurance companies.

The act of 1853 was amended in 1862, but it is not necessary here to give the amendments in detail.

The plaintiff alleges that the defendant was organized under the general act of 1853, and in pursuance of its provisions entered into the business now carried on by it.

It is, therefore, not necessary to look for any act or acts incorporating the defendant, for no such act or acts are to be found.

It cannot, therefore, be said that the defendant has, in the language of section 39 of the 2d Revised Statutes (*page* 484), "violated any of the provisions of its *act* or *acts* of incorporation."

But the thirty-ninth section of the Revised Statutes (*supra*) also provides for a case where an insurance company "shall have violated \* \* any other act binding on such corporation."

It is not alleged that the defendant is insolvent, but, on the contrary, it is expressly alleged by the plaintiff that the defendant is wholly solvent.

It becomes important, therefore, to turn to the general act of 1853 and the amendments thereof, and to consider its provisions, and the allegations of the complaint in connection therewith.

The plaintiff alleges that the defendant, by putting \$14,000 into its annual statement as cash paid to its stockholders as dividends or interest, in 1868, when, in fact, it never was paid, made a false statement.

Other allegations are made in the complaint in respect to



---

Fisher agt. World Mutual Life Insurance Co.

---

supposed irregularities and improprieties of the defendant in respect to its annual statements, which are claimed to be in violation of law.

By section 18 of the act of 1853 it is provided that "every violation of the act shall subject the party violating to a penalty of \$500 for *each violation*, which shall be sued for and recovered in the name of the people," &c.

By the twelfth section of the act of 1853, an annual statement is required, and its contents are prescribed. If, therefore, there has been a violation of the provisions of the act of 1853, by the defendant, in respect to its annual statement, the penalty therefor is prescribed by the act of 1853, in the terms of section 18, already quoted.

An action may be brought, in the name of the people, to recover \$500, by the district attorney of the county in which the company is situated, and one-half of the penalty will belong to the "informer," and the other half to the treasury of the county.

It, therefore, is clear that the violations of the act of 1853, in respect to annual statements by the defendant, may be the subject of the action provided for by the eighteenth section of the act.

It will be observed that section 17 of the act of 1853 also provides for an examination into the affairs of a company formed under the general act, by the comptroller, and he may also invoke the action of the attorney-general, who may make application to this court for an order to show cause against the company, requiring it to show cause why its business should not be closed. If its insolvency shall appear, the court may decree a dissolution of the company.

It will be seen by these sections that a penalty is prescribed for every violation of the act, and the course is prescribed for a dissolution of the company in a case coming within its provisions.

It was urged, upon the argument by the learned counsel for the plaintiff, that sections 39 and 40 of the Revised

---

Fisher agt. World Mutual Life Insurance Co.

---

Statutes are applicable, and, therefore, that a *stockholder* can maintain this action.

This argument renders it necessary to consider section 11 of the act of 1853 (*4th vol. of Statutes at Large* [Edmonds' ed.], 219).

It is as follows: "all companies *formed under this act* shall be deemed and taken to be bodies corporate and politic, in fact and in name, and shall be subject to all the provisions of the Revised Statutes in relation to corporations, *so far as the same are applicable, except in regard to annual statements and other matters* herein otherwise specially provided for."

The words in the latter part of this section are very important and controlling upon the question now under consideration. The section is to be construed as though it read, companies formed under this act shall not be subject to the provisions of the Revised Statutes in regard to annual statements, and shall not be subject to the Revised Statutes in respect to other matters herein specially provided for.

The object of the exception was to prevent the application of the Revised Statutes to the annual statements, and to prevent their application to any "other matters" specially provided for in the act of 1853 (*Potter's Dwarrris on Statutes*, 119; 1 *Washington C. C. R.*, 119, *opinion of* WASHINGTON, J.; *Irving agt. U. States*, 15 *Peters*, 423).

Upon the construction of the eleventh section of the act of 1853 given, it must be concluded that the thirty-ninth and fortieth sections of the Revised Statutes are inapplicable.

The annual statements required of this defendant are regulated by the act of 1853.

So, too, that act "provides for every *violation*" of the act. The violation of the act being "specially provided for" by it, the exception found in section 11 expressly excludes the application of the Revised Statutes to the "violations" of the act of 1853.

The remedy for any supposed violation is to be pursued under the act of 1853. That is the exclusive remedy in

---

Fisher agt. World Mutual Life Insurance Co.

---

respect to annual statements, and in respect to every violation of the act.

If the plaintiff is prepared to prove a violation of the act of 1853, then he can become "an informer" against the company, and cause a suit to be brought by the district attorney of the proper county for the recovery of the \$500 of penalty, and receive one-half, as provided in section 18 of the act.

He is not in a situation to bring a suit in his own behalf, asking no personal relief—a suit not stated to be in behalf of all other stockholders who will come in and share its benefits, who are similarly situated (45 *Barb.*, 510)—a suit in which an injunction and receiver are asked for, because of supposed violations of the act of 1853 (1 *Edwards' Ch.*, 95).

The directors are not parties, and if they are guilty of frauds and illegal acts, injuriously affecting the rights of the plaintiff, they should be made parties (5 *Paige*, 607; 9 *Barb.*, 65; 45 *Barb.*, 510; 36 *Howard*, 20; 4 *Abbott [N. S.]*, 107; 1 *Kernan*, 243; 55 *Barb.*, 667).

Courts of equity should not be called upon to usurp the province of directors, nor to govern them in the exercise, fairly and legitimately, of the discretion vested in them by the acts relating to the corporations in whose behalf they act.

Differences, as to the internal management, can be settled by stockholders at elections of directors, oftentimes more judiciously than by the interference of a court of equity (51 *Barb.*, 378).

The demurrer is sustained, with leave to the plaintiff to amend, upon payment of the costs thereof.



---

People *ex rel.* Martin agt. Earle.

---

## SUPREME COURT.

THE PEOPLE *ex rel.* PATRICK MARTIN agt. ABRAHAM L.  
EARLE, Auditor.

SAME agt. ANDREW HASWELL GREEN, Comptroller.

*Mandamus to auditor and comptroller — to audit and pay relator's claim.*

A *mandamus* will issue against the auditor, and also one against the comptroller of the city of New York, requiring them to audit the voucher and pay the amount thereof to the relator for services rendered by him for the county, as assistant janitor to the new county court-house, where his claim has been properly adjusted, audited and allowed by the board of supervisors, and it appears that there is an unpaid balance in the treasury appropriated for such expenses.

And it is no answer to the relator's claim, by these officers, to assert that the relator's name is not on the pay-rolls of the commissioners of the court-house for the time he claims pay. That is a matter with which they have nothing to do. The board of supervisors have attended to that duty.

The duties of boards of supervisors generally, and especially in the city and county of New York, in connection with the duties of auditor and comptroller, considered and discussed.

*New York Special Term, October, 1873.*

MOTIONS for a peremptory writ of *mandamus*, requiring the auditor to audit and the comptroller to pay the claim of the relator.

*Abraham R. Lawrence and Elliot Sandford*, for relator.

*E. Delafield Smith*, for respondents.

FANCHER, *J.*—The relator moves for a *mandamus* to the auditor to audit and allow, and for a like writ to the

---

People *ex rel.* Martin agt. Earle.

---

comptroller commanding payment of his claim of \$240, for his compensation as assistant janitor of the new county court-house.

He swears that on the 1st day of May, 1870, he was appointed assistant janitor of the new county court-house by the court-house commissioners, and that his compensation was fixed at three dollars per day; that he thereupon entered upon the performance of the duties of the position, and faithfully performed the same to the 1st of June, 1871, when he ceased, because payment for his services was refused.

He further states that he was paid for his services up to the 1st of December, 1870, and also for the months of February, March and April, but for December, 1870, and January and May, 1871, he has not been paid.

His affidavit further shows that on the 9th of December, 1872, the board of supervisors audited and allowed his claim at \$240, and directed the comptroller to pay the same from the proper appropriation.

It is further alleged in the moving papers that of the appropriations for cleaning and supplies for county purposes, for the year 1872, there remained unexpended on the 31st of December, 1872, the sum of \$18,132.52, and of the appropriation for like purposes, for the year 1873, there remained on the 12th of September, 1873, unexpended, \$8,783.50, from which appropriations the relator's claim could be paid; but, after proper demand, the auditor has refused to audit and the comptroller has refused to pay the claim.

The auditor, in answer to the relator's affidavit, states that the relator's name is not on the pay-rolls of the commissioners of the court-house, for December, 1870, and January and May, 1871, and that he was not recognized by the commissioners as their employe during that time; also that there is no money in the treasury appropriated or legally applicable to the payment of the relator's claim.

It appears, on a reference to the printed proceedings of the supervisors (*p.* 239), that a special committee was

---

People *ex rel.* Martin agt. Earle.

---

appointed on the 24th of June, 1872, to inquire into and report to the board as to all claims which may be fairly due for labor of employes who have actually rendered service in the maintenance of the new court-house under the direction of the court-house commissioners. On the 9th of December, 1872, the special committee reported that they had adjusted the claims of certain persons who had presented themselves before the committee, and they submitted a resolution that the claims of seven persons for certain specified sums, among them Patrick Martin, assistant janitor, \$240, for services in the new county court-house, be audited and allowed at the above amounts, and the comptroller directed to pay them from the proper appropriation. The resolution was adopted by a unanimous vote.

A provision was contained in chapter 590 of the Laws of 1857, which is similar to that contained in chapter 190 of the Laws of 1870, to the effect that the finance department of the city shall have the like powers and perform the like duties in regard to the fiscal concerns of the board of supervisors as the department possesses in regard to the concerns of the corporation of the city of New York, and that all moneys drawn from the treasury, by authority of the board of supervisors, shall be upon vouchers for the expenditure thereof, examined and allowed by the auditor and approved by the comptroller.

It has been contended that this statute of 1870 substitutes the auditing power of the comptroller for that of the board of supervisors, or is concurrent with it; I do not assent to the proposition.

It must be conceded that, were it not for the statute just quoted, the audit and allowance, by the supervisors, of a claim which is a proper and legal county charge would be conclusive, and the finance department would, thereupon, be obliged to pay it (1 *R. S.*, 367, § 4, *sub.* 2; 1 *R. S.* [5th ed.], 848; *People* agt. *Lawrence*, 6 *Hill*, 244; *People* agt. *Supervisors of Dutchess*, 9 *Wend.*, 508). But the statutes of 1857



---

People *ex rel.* Martin agt. Earle.

---

and of 1870 have unquestionably thrown a new safeguard around the treasury.

It is that all moneys drawn from the treasury by authority of the board of supervisors shall be *upon vouchers* for the expenditure thereof.

This condition is supplied in the present case by the relator's bill for three months' services, duly audited and allowed by the supervisors.

In this case the auditor has not examined and allowed the voucher, nor has the comptroller approved of it. Such audit, allowance and approval are essential prerequisites to the payment of the claim (*People ex rel. Ellis* agt. *Flagg*, 15 *How. P. R.*, 554; *People ex rel. Brown* agt. *Green* [*MSS.*], *general term of November, 1874*).

Yet, where the relator has been properly employed, has rendered the services required, and his claim has been audited, approved and ordered to be paid by the board of supervisors, he has not only a just claim against the county, but a right to have his voucher audited, allowed and approved and to have his claim paid by the finance department. The case last cited is authority for such proposition.

If the case of *Ellis* (*supra*) be supposed to be an authority against the proposition, it may be answered, there is a later authority in favor of it (*People ex rel. Brown* agt. *Green* [*MSS.*], *general term decision*).

COMSTOCK, J., in *People* agt. *Flagg* (17 *N. Y.*, 588), in relation to a claim against the city, said, the comptroller could not be compelled to draw his warrant until the claim was audited according to law.

The due employment of the relator by the common council, or their recognition of his services, *gave him a just claim against the corporation* and a right to have his account audited in the manner provided.

The adjustment of the amount belonged to the auditing bureau in the department of finance, and if that department

---

People *ex rel.* Martin agt. Earle.

---

or bureau should refuse to audit it a mandamus would be an appropriate remedy to compel them to do so.

When the claim is thus audited it is presumed that the comptroller can be compelled by mandamus to draw his warrant for the sum allowed.

The reasoning of this decision is consistent with just principle, and is applicable to the present case.

The auditing bureau in the finance department cannot arbitrarily refuse to examine and approve the proper voucher for an audited claim, nor can the department refuse to approve or pay such a claim. The auditing bureau cannot reverse the action of the supervisors.

When the amount has been ascertained and fixed by the board of supervisors, and the services for which the claim was made have been rendered to the county, it is not competent for the auditor to refuse to audit the voucher, nor the comptroller to refuse to approve it or pay the claim.

The intention of the statute, plainly, is not to substitute the auditor for the supervisors, but it is to grant to him power to audit the voucher for claims on the treasury, so that he may examine and ascertain whether they have been audited and allowed by the board of supervisors.

If so audited the voucher thereof should be produced to the finance department. There may be an audit and allowance by the supervisors when the amount has not been extended; *e. g.*, their audit of a janitor's claim may fix his compensation at a specified sum per month for certain specified months.

The auditor's duty would be to extend or state the aggregate sum allowed to the claimant, so that the examination of the claim should appear and the voucher be audited at the proper sum; but he clearly would have no power to change the rate to another sum per month, nor to refuse to audit the voucher at all.

The board of directors is, by law, charged with the management of the affairs of a corporation, as supervisors are of the affairs of a county

---

People *ex rel.* Martin agt. Earle.

---

Should the directors employ a janitor, fix his salary, and after a term of service audit his bill and direct that it should be paid, would it be contended that an auditor of the vouchers for claims against the corporation and its cashier, though the former were empowered to audit the vouchers and the latter to approve the same, could overrule or reverse the action of the directors as to the merits of the claim.

The language of judge COMSTOCK would be applicable to such a state of facts in respect of a county charge. Should the auditing bureau refuse to audit, or the disbursing officer refuse to pay, a mandamus would be an appropriate remedy to compel them to do so.

*The People ex rel. Kelly agt. Hawes* (12 Abb. Prac., 192), it was held that the provisions of the act of 1857 did not give the comptroller power to examine and disallow county charges which had already been examined and allowed by the board of supervisors, and that the power in respect to such claims was limited to the examination of vouchers.

That decision is sustained by the literal and grammatical construction of the law of 1870.

The language is: "All moneys drawn from the treasury, by authority of the board of supervisors, shall be upon vouchers for the expenditure thereof, examined and allowed by the auditor, and approved by the comptroller."

That is, when the board of supervisors, by the authority vested in them, have ordered a county charge to be paid, there shall be presented to the auditor the proper voucher for the expenditure, which he shall examine, and, if sufficient, shall allow, and the comptroller shall approve of the same before the money is paid. The check intended by this statute is one to prevent payment without proper vouchers.

It certainly was not the intention of the statute to substitute a new government in county affairs, or make the board of supervisors subordinate to an auditor or to the fiscal officer of the treasury.

As was well observed by Mr. justice SUTHERLAND, in the



---

People *ex rel.* Martin agt. Earle.

---

case last cited, "the discretionary nature of the power vested in the board of supervisors to examine, settle and allow all accounts chargeable against the county, would appear to be inconsistent with a right on the part of their fiscal agent or disbursing officer to question the regularity or propriety of the exercise of their discretionary power." (*See, also, People ex rel. Brown agt. Green* [MSS.], *general term of Nov., 1873*).

In the *People agt. Supervisors of Delaware County* (45 N. Y., 199), it was held that charges for services rendered to the county could be collected in one way only. The account of them must be presented to the board of supervisors of the county, which alone has the power to examine, settle and allow, and to raise the money by tax with which to defray the same.

It was also said in that case: "The court has the power to decide whether a rejected claim is a legal claim against the county; and if it be a legal claim it may instruct and guide the board of supervisors, by *mandamus*, in the execution of their duty."

The board of supervisors derive their powers of local legislation and administration from the constitution and laws of the state, and their action as to county affairs, within the limits of their jurisdiction, is not subject to revision by the fiscal officers of the treasury.

Section 17 of article III of the constitution provides: The legislature may confer upon the boards of supervisors of the several counties of the state such powers of local legislation and administration as they shall from time to time prescribe.

Among the general powers conferred by statute on boards of supervisors, it is provided in the Revised Statutes (*vol. 1, 5th ed., p. 848*) that they shall have power to examine, settle and allow all accounts chargeable against such county, and to direct the raising of such sums as may be necessary to defray the same.

Boards of supervisors, in auditing and allowing accounts, are limited to the powers conferred upon them by statute;

---

People *ex rel.* Martin agt. Earle.

---

but if the subject-matter of the account be within their jurisdiction and they allow it, the county treasurer has no right to refuse payment on the ground that the allowance was too much or was made upon insufficient evidence.

This principle has been deliberately decided (*People ex rel. Merrett* agt. *Chamberlain of N. Y.*, 6 *Hill*, 244; *People ex rel. Onderdonk* agt. *Supervisors of Queens Co.*, 1 *Hill*, 195, 200).

Their act in examining and allowing accounts chargeable to the county is a judicial act and their decision is binding upon all parties concerned (*People* agt. *Stocking*, 50 *Barb.*, 573; *Weaver* agt. *Deafen*, 3 *Den.*, 117; *Chase* agt. *County of Saratoga*, 23 *Barb.*, 503; *People* agt. *Supervisors of Livingston*, 26 *Barb.*, 118).

If their decision be wrong, it can only be reviewed by a court of competent jurisdiction. It is not subject to revision by a fiscal officer of the treasury.

I therefore think that the claim of the relator, when it was examined, audited and allowed by the board of supervisors and was by them ordered to be paid, became a legal and valid liability against the county.

A fiscal officer cannot thereafter become recusant and refuse to audit the voucher or to pay the claim.

When the supervisors have decided that the relator, as an employe of the county, has performed services for which he was entitled to be paid \$240, it is no answer for the finance department to return, that the name of the relator was not on the pay-roll for the three months of such service, nor that the commissioners of the court-house did not recognize him.

The technical omission of his name on the pay-roll is of no importance, provided he actually rendered the service for which he was employed, as the supervisors have adjudged he did; and the alleged want of recognition by the commissioners of the court-house is answered by the decision of the supervisors adjudging that the relator performed the duties of his appointment for the time mentioned.

---

People *ex rel.* Martin agt. Earle.

---

The auditor states in his affidavit "that there is no money in the treasury appropriated or legally applicable to the payment of the relator's claim."

It is shown by the relator's affidavit, and not denied, that an unexpended balance of \$18,132.52 remained in the treasury for cleaning and supplies, for county purposes, for the year 1872, and an unexpended balance of \$8,783 on the 12th of September, 1873, for like purposes, out of which balances of appropriations the relator's claim can be paid.

It is, therefore, only a legal conclusion of the auditor to assert that there is no money in the treasury appropriated or legally applicable to the payment of the relator's claim.

The fact is not denied that moneys are in the treasury from which the claim can properly be paid, and the relator specifies the fund.

The motion for a mandamus to the auditor to audit the voucher and to the comptroller to approve the same and pay the claim, should be granted.



---

Christy agt. Kiersted.

---

## SUPREME COURT.

EMMA L. CHRISTY *et al.* agt. NATHANIEL C. KIERSTED *et al.*ELISHA KILBURN *et al.*, as administrators, &c., agt. MILES COE.*Trial of issue of law — in the proper county.*

Where there is a demurrer to the whole complaint, the issue of law thereon must be tried in the county designated in the complaint. It cannot be tried as a mere motion at any special term in the judicial district.

The court may change the place of trial, when the county designated in the complaint is not the proper county; and this irrespective of issues, whether of law or of fact. If changed, the trial must be had in the county to which it is changed. If not changed, the trial must be had in the county designated in the complaint.

*Erie Special Term, August 25, 1874.**Allen & Thrasher*, for plaintiffs in first case.*F. S. Smith*, for defendant.*Jenkins & Congdon*, for plaintiffs in second case.*Allen & Thrasher*, for defendant.

LAMONT, J.—The place of trial designated in the complaint in the first action is Cattaraugus county; in the second, Chautauqua county; and in each there is a demurrer to the whole complaint. In both actions the objection is made, that the trial of such issues of law cannot be had in Erie county; and, on the other hand, it is claimed that such issues may be tried, as mere motions, at any special term in the judicial district.

---

Christy agt. Kiersted.

---

The Code requires that the complaint shall contain (among other things) the name of the county in which the plaintiff desires the trial to be had (*Sec.* 142). I cannot find any authority in the Code or in the general rules of the court to bring on a trial of the action in any other county than the one so designated, unless it is done by consent of parties or by order of the court. The rules do not prescribe *where* such a trial shall take place. If the general rules of the court should denominate the trial of an issue of fact as an enumerated motion, I should still doubt if such trial could be had at any place in the district. If we look at the Code, it will be found that the distinction prevails throughout, between a motion and a trial, an order and a judgment, a notice of motion and a notice of trial.

The defendants in both these actions demur to the whole complaint, and they do not, on the hearing, apply or ask for an order, but for a judgment; and if they succeed they obtain a judgment, unless the court may see fit to grant plaintiffs leave to amend. The nature of the application determines whether it is a motion or not (*sec.* 401), if we adhere to the Code definition. It is also provided that the party noticing the action for trial shall furnish *the clerk* with a note of the issue, and *the clerk* shall enter the cause upon the calendar (*Sec.* 256). What clerk? The clerk of the county mentioned in the title of the complaint (*sec.* 466), or in another county to which the court may have changed the place of trial. *Ward* agt. *Davis* (6 *How.*, 274) decides nothing. The plaintiff attempted to bring on the trial of an issue of law — a demurrer — in a county other than that designated in the complaint. The other party took no notice of his motion, and the court allowed him to withdraw his papers, they being defective. The learned justice who wrote an opinion in that case says, expressly, that if the provisions of the Code (to which he refers) are to be construed literally, that Saratoga county (*i. e.*, the county designated in the complaint) is the county where this issue of law as well as the issue of fact is

---

Christy agt. Kiersted.

---

to be tried. But he seems to found a contrary conclusion upon the circumstance that the title of the Code relating to changing the place of trial applies only to the trial of issues of fact. I am not able to perceive how the provision relating to a change of the place of trial touches the question as to where the trial ought to be before such change is made or afterward. The learned justice says he is of opinion that title 4 of part 2 of the Code (§§ 123 to 126) relates *exclusively* to the trial of issues of fact, in which observation he is certainly mistaken, for the language is, if the county designated for that purpose in the complaint be not the proper county, the action may, notwithstanding, be tried therein, unless the defendant, *before the time for answering expire*, demand, in writing, that the trial be had in the proper county, and the place of trial be thereupon changed by consent of parties, or by order of the court, as is provided in this section (126). Such demand must be *before* issue joined, and the party so demanding may force a change of the place of trial, if his demand is made in due time, even though he suffer a default. It is a matter of absolute right (3 *Abbott*, 16, *in note to Wood agt. Hollister, and cases cited*; *Hubbard agt. Nat. Protec. Ins. Co.*, 11 *How.*, 149). The court may (and will) change the place of trial when the county designated in the complaint is not the proper county; and this, irrespective of issues, whether of law or of fact. Until the place of trial is changed in the manner by the Code prescribed, every trial must take place in the county designated in the complaint. And after the place of trial is changed, every trial must be had in the county to which the place of trial is changed. The language of the Code is plain, and the literal reading expresses the true meaning.

Both these cases are, therefore, stricken from the calendar for being placed there irregularly.



---

Sheriff agt. Smith.

---

## SUPREME COURT.

JAMES A. SHERIFF and another agt. HENRY C. SMITH and  
OWEN EVANS.

*Judgment of another state—jurisdiction may be inquired into.*

A judgment recovered in a court of record of another state is not conclusive as to the jurisdiction of that court.

Where it appears from the record that the proof given on the trial clearly established that there was no personal service of process upon one of the joint defendants, and that he did not authorize any attorney to appear for him in the action, the complaint, in an action on the judgment here, will be dismissed as against such defendant.

Where the certificate of the prothonotary attached to the exemplification of the record of judgment from another state is signed by the "chief clerk," whose signature is duly attested by the "presiding judge" of the court, it is sufficient.

*Oneida Circuit, June, 1873.*

ACTION upon a judgment recovered in Venango county court of common pleas in the state of Pennsylvania.

*D. E. Pomeroy*, for plaintiff.

*R. O. Jones*, for defendants.

HARDIN, J.—In this state it is the settled law that an appearance by an attorney, though unauthorized, confers jurisdiction of the person in cases where the court has jurisdiction of the subject-matter (*Denton agt. Noyes*, 6 *John. R.*, 295; *Brown agt. Nichols*, 42 *N. Y.*, 26; 48 *N. Y.*, 160; *McCormick agt. Penn. C. R. R. Co.*, 49 *New York*, 308).

---

Sheriff agt. Smith.

---

But it is held in *Kerr* agt. *Kerr* (41 *New York*, 272), that inquiry may be made into the jurisdiction of the court of another state in which the original judgment was rendered, and into the right of a court to exercise authority over the parties or the subject-matter, and that such inquiry may be made, "although, according to the statements in the record itself, the court had acquired jurisdiction of the person and subject-matter." This proposition is sustained by conclusive authority (*Hoffman* agt. *Hoffman*, 46 *New York*, 32, and cases cited).

The judgment recovered in the Pennsylvania court is not conclusive as to the question of jurisdiction of that court (46 *N. Y.*, 33).

The proof given at the trial clearly establishes that there was no personal service made upon the defendant Smith, and that he did not authorize any attorneys or attorney to appear for him in the action.

Since the decision in 1812 by the United States court of *Mills* agt. *Duryee* (7 *Cranch*, 481), it has been held in this state that the judgment of a court of a general jurisdiction in any state in the Union is equally conclusive upon the parties, in all the other states, as in the state in which it was rendered, subject to two qualifications: first, if it appear by the record that the defendant was not served with process and did not appear in person or by attorney, such judgment is void; second, if it appear by the record that the defendant appeared by attorney, the defendant may disprove the authority of such attorney to appear for him (*Shumway* agt. *Hillman*, 6 *Wendell*, 452 and 453; *Shelton* agt. *Tiffin*, 6 *How. U. S.*, 163; *Kinmer* agt. *Kinmer*, 45 *N. Y.*, 541).

When jurisdiction is obtained of the person and subject-matter, the judgment is conclusive until set aside (12 *N. Y.*, 156; 45 *N. Y.*, 542).

It is not necessary to determine here the effect of an appearance not authorized by Smith, in the Venango court, as

---

Sheriff agt. Smith.

---

to the copartnership property. Such appearance does not bind Smith personally (*Phelps agt. Brewer, 9 Cushing, 390*).

It must be held that the judgment of the Venango county court of common pleas is binding upon the defendant Evans and conclusive evidence of his liability to the plaintiffs, but it does not bind the defendant Smith, as the court had no jurisdiction of his person, and there was no such appearance of attorneys as to bind him personally. Formerly the result above stated would require the court to nonsuit or dismiss the complaint as to both defendants. But the rule is changed by the Code (§§ 136 and 274; *McIntosh agt. Ensign, 28 New York, 169*; *Fielden agt. Lahens, 6 Abbott [N. S.], 341*).

The latter case was an action against several persons alleged to be partners, and the proof failed to show some of them liable, and as to the latter the complaint was dismissed, and judgment given against the other defendants.

This being an action upon a judgment, which is a contract of the highest character, the same rule applies (*Taylor agt. Root, 4 Keyes, 335*).

The certificate by the prothonotary attached to the exemplified record must be held sufficient.

Burrill, in his Law Dictionary, defines "prothonotary" to mean "a chief clerk in the English courts and courts of king's bench and *common pleas*," and adds that "*the chief clerks* of some American courts are called prothonotaries."

In *Morris agt. Patchin (24 N. Y., 395)* it was held that the attestation by a deputy is not sufficient. Here the certificate is by the "clerk" — the chief clerk — and the certificate of the judge is also appended to the effect that the person certifying is the proper officer to make such certificate.

The act of congress of 1790 requires "a certificate of the judge, chief justice or presiding magistrate, as the case may be, that such attestation is in due form;" and it is difficult to see any reasonable ground for holding the words "John Trukey, president judge of the court of common pleas for



---

Sheriff agt. Smith.

---

said county," do not come up to the requirements of the act of congress.

Judgment is ordered in favor of the plaintiffs for the amount due upon the judgment and interest against the defendant Evans, with costs, and in favor of the defendant Smith, dismissing the complaint of the plaintiffs, as to him, with costs (18 *How.*, 102, 108; 43 *How.*, 91).

---

McDonald agt. James.

---

## NEW YORK SUPERIOR COURT.

JOHN McDONALD agt. SARAH JAMES and another.

When an injunction contains an order to show cause, six days thereafter, why it should not be continued during the pendency of the action, and, upon no cause being shown, the injunction is continued by order of the court, it becomes a new proceeding;

Therefore, it cannot be claimed that the counsel fees paid by the defendants for the trial of the action were incurred by reason of the preliminary injunction, but rather by reason of the injunction which was continued by the order of the court.

An injunction granted does not change the legal relation between landlord and tenant;

Therefore, it is error for a referee to make the fair value for the use and occupation of the premises, during the time the defendants were restrained, part of the damages sustained.

The true basis for such estimate must be the loss of rent, by reason of the insolvency of the tenants, or otherwise, incurred during the pendency of the injunction.

*Special Term, September, 1874.*

MOTION to confirm the report of a referee to whom it was referred to ascertain damages.

The plaintiff alleged that he was the owner in fee of certain premises in possession of his tenants. That the defendants, claiming to be the owners of the same premises, had instituted a proceeding, before one of the civil justices of the city, for a warrant to remove such tenants from said premises, alleging them to be the tenants of said defendants.

Upon these facts the plaintiff procured a temporary injunction, restraining the further prosecution of such proceeding, with an order to show cause, returnable at a short day, why

---

McDonald agt. James.

---

the injunction should not be continued until the trial of the action, and gave the usual undertaking.

No cause was shown by the defendants, and the injunction was continued by the order of the court.

Upon the trial of the action it was determined that the plaintiff was not entitled to the injunction, and the complaint was dismissed, with costs.

A reference was ordered to ascertain the damages of the defendants by reason of the injunction.

Exceptions by the plaintiff to the referee's report were filed, and brought to a hearing with the motion to confirm the report.

*Mr. McDonald*, in person, and *Mr. Quackenbush*, for plaintiff.

*Mr.* — and *Mr. James*, for defendants.

MONELL, *C. J.*—It distinctly appears that no attempt or effort was made by the defendants to obtain a vacation of the injunction until the trial of the cause.

The injunction contained an order requiring the defendants to show cause, six days thereafter, why it should not be continued during the pendency of the action. No cause was shown, and the injunction was continued by the order of the court.

The undertaking was required upon an *ex parte* application for the injunction, and covered such damages as the defendants might sustain, until they could, in the usual course and practice of the court, move to have it dissolved. When the court, upon the order to show cause, continued the injunction, it became a new proceeding, and it cannot be claimed that the counsel fees paid or incurred by the defendants for the trial of the action were paid or incurred by reason of the preliminary injunction; but they were incurred by reason



---

McDonald agt. James.

---

of the injunction which was continued by the order of the court.

In *Andrews agt. Glenville Woolen Co.* (50 *N. Y. R.*, 282) a motion was made to dissolve the injunction, which was denied, but not upon the merits, the court declining to inquire into the merits until the final hearing. The defendant had, therefore, to go to trial, and the court, in allowing as damages the counsel fees for the trial, put it upon the ground that the defendant had made the proper effort to dissolve the injunction before the trial. But the court declining to hear the motion, a trial was necessary, not merely to dispose of the issues, but to get rid of the injunction. The court say: "Until the cause should be tried, the defendant was obliged to submit to the restraint. It was placed in that position by the order of the court and not by its own laches." And in *Hovey agt. The Rubber Tip Pencil Co.* (*id.*, 335) counsel fees on the trial were expressly disallowed, on the ground that the defendant had not moved to dissolve the injunction.

These decisions are fatal to the allowance of any counsel fees in this case, as none appear to have been incurred, by reason of the preliminary or temporary injunction.

I think the referee fell into another error in estimating the other damages claimed by the defendants. It seems he ascertained what was the fair value for the use and occupation of the premises during the time the defendants were restrained, and made that the basis for ascertaining the damages.

The defendants were restrained from interfering with the possession and from proceeding to recover the possession of the premises. They had alleged, in such proceeding, that the persons in possession were their tenants, and they sought to remove them from the premises. The court found them to be such tenants of the defendants.

Such relation of landlord and tenant did not cease with the institution of the injunction suit, nor with the institution of the proceeding before the civil magistrate, but it continued

---

McDonald agt. James.

---

and subsisted between the defendants and the persons in possession at all times from the commencement of the action to the dissolution of the injunction ; so that, upon such dissolution, the landlord was restored to all the rights and remedies, in respect to her tenants, which had been suspended by the injunction. Among them the injunction had suspended the collection of rent, but it neither canceled the leases nor defeated or annulled the tenants' covenant to pay rent ; and, therefore, immediately upon the suspension being removed, the landlord could have proceeded to enforce the covenant ; and she can still do so. Even if she had procured and executed a warrant of removal, her remedy for rent to the time of such removal remained (*Hinsdale agt. White*, 6 *Hill*, 507 ; *McKeon agt. Whitney*, 3 *Denio*, 452).

The inquiry, therefore, should be, what rent has the defendant lost by reason of the injunction ?

The answer will depend upon a variety of facts. If the tenants were and are responsible, then their covenant can be enforced and the rent recovered ; then there would be no actual loss. If, however, they had become irresponsible, or had abandoned the premises pending the injunction, or the premises or any part of them were unoccupied and might have been rented, there might be a loss of rent to the defendants.

In short, the loss must be ascertained in view of the responsibility of the parties and their several remedies, and also in view of the condition of the premises and the landlord's ability to have rented or collected rent while the injunction continued, which he is now unable to collect, by reason of the irresponsibility of the tenants, or by reason of the premises being unoccupied ; for such loss the defendants should recover, as the legitimate damages sustained by reason of the injunction.

If the plaintiff, pending the action, collected any rent of the tenants, the amount so collected will form a part of the damages. The plaintiff is not entitled to any allowance or

---

McDonald agt. James.

---

deduction for repairs or improvements, unless they have been allowed by him to the tenants and deducted from the rent received by him.

It must be referred back to the referee to disallow the counsel fees and to re-estimate the item of damages growing out of the loss of rent upon the basis stated in this opinion.

In all other respects the report of the referee is undisturbed and confirmed.



---

Board of Commissioners of Pilots agt. Spofford.

---

## SUPREME COURT.

THE BOARD OF COMMISSIONERS OF PILOTS agt. PAUL N.  
SPOFFORD and another

*Extra allowance of costs.*

Where counsel, at or previous to the trial, agree that the amount for which the plaintiff claims to recover in the action shall be fixed at a certain sum, this sum will form the basis for an extra allowance of costs.

*New York Special Term, July, 1874.*

MOTION for extra allowance of costs.

*Mr. Butler*, for plaintiff.

*Mr. Thorn*, for defendant.

WESTBROOK, J.—The additional affidavit submitted shows that, by an agreement between counsel made prior to the trial of the above action, the amount which the plaintiff claimed to recover therein was \$4,600.

Section 349 of the Code provides for an allowance "not exceeding five per cent upon the amount of the recovery or claim, or subject-matter involved." The compensation is for the work and labor of the trial, and it seems to me that the allowance should be based upon the amount which was shown by that contest to be really in dispute. The sum for which the complaint demands judgment really is the claim of the plaintiff; and especially can it not be so regarded when counsel, by actual agreement, fix it less. Parties frequently adjust the amount of a recovery for which judgment may be had, provided there is any recovery at all. Take for example an

---

Board of Commissioners of Pilots agt. Spofford.

---

action of trespass, *quare clausum fregit*, in which the complaint claims \$1,000 as damages. On the trial counsel stipulate that the amount of actual injury is \$250; which sum the plaintiff shall recover, provided the *locus in quo* is found to belong to him. Suppose, in such a case, the defendant has a verdict, upon what sum would the allowance be based, and what would be considered the claim of the plaintiff? Or in an action for the conversion of personal property, when the value of the property taken is admitted upon the trial, the litigation being as to the title and the defendant succeeds, what, in such a case, is the claim?

The supposed cases illustrate this. The claim was actually \$4,600, and this was the amount concerning which a trial was had and the labor performed.

It follows that the order should give to the defendant an allowance of five per cent upon the sum of \$4,600. Considering the extent of the litigation, the amount will not be unreasonable. The character in which plaintiffs sue, and the objects of an action, are neither of them elements which the court can regard in fixing the allowance. No discretion, based upon any such consideration, has, by the Code, been committed to the judiciary.

---

Hadley agt. Barton.

---

## SUPREME COURT.

THEODORE D. HADLEY, appellant, agt. JOSEPH BARTON,  
respondent.

*Agreement to raise crops on shares—title of owner of the land to tenant's share—as per agreement for advances made—sale and possession of premises to a third person.*

Plaintiff, being the owner of a farm, in March or April, 1870, entered into an agreement with one C. to cultivate a certain portion of it on shares, plaintiff to retain the absolute title and possession of C.'s share of the crops raised, as security for certain advances made by the plaintiff.

On the 10th of June, 1870, after the crops had been sown and planted by C.—the plaintiff, in the meantime, having advanced to C. money to pay for seed, &c., in the whole to the sum of \$280—the plaintiff sold the farm, by an executory contract, to one G., and delivered to G. the immediate possession, without any reservation or notice of C.'s interest therein.

C., having gone on, subsequent to the sale, and harvested and gathered the crops, sold his share (amounting to about \$280) to the defendant. The plaintiff claimed that C. had no title to convey; that never having paid back to plaintiff the advances made to C., the title and possession of C.'s share was in the plaintiff, and therefore brought this action for conversion.

*Held*, that by the contract with G., the purchaser, without reservation, the plaintiff transferred to G. the immediate right of possession, and all the right to the crops then growing or thereafter to be planted and grown and harvested; and thereby disengaged himself from performing any agreement with C. for cropping on their joint account, and necessarily abandoned that agreement, and was estopped from setting up any claim to the crops thereafter to be cultivated and harvested on the farm as against his vendee, G. The plaintiff had clothed G. with the apparent and also with the real title. The action could not be sustained.

E. DARWIN SMITH, J., *dissenting*. Holding, that the agreement which the plaintiff proved, and which the referee found to have been made between the parties in respect to working in common of the farm, did not involve



---

Hadley agt. Barton

---

or create any relative rights of tenants in common in respect to the crops.

Parties can make an agreement for the cultivation, by one of them, of the land of another which does not, in legal effect, make them tenants in common, as between themselves in respect to the crops, and such an agreement the plaintiff made in this case with C.

By this agreement it was understood by both parties that the crops should belong to the plaintiff till his advances made to C. should be paid, and such advances were made on the faith and security of such agreement. This was at that time the only way in which the plaintiff could secure himself for the advances made, and to be made, as there was nothing then upon which a chattel mortgage could operate, the crops not being in existence. The plaintiff testified that "the defendant stipulated that I should have my pay out of the crops, and they should remain in my possession and be mine until my advances were paid."

The plaintiff, therefore, had the title to the crops, and the whole title thereto as between him and C., and they were not tenants in common in such crops. The referee erred in dismissing plaintiff's complaint. Judgment affirmed.

*General Term, Fourth Department, January, 1874.*

MULLIN, P. J., TALCOTT and E. DARWIN SMITH, JJ.

IN the forepart of 1870 the plaintiff was the owner of a farm, and on the fourteenth of April in that year signed a note for one Command to secure the purchase-price of a horse, under the verbal arrangement that the plaintiff should have the right to and the possession and ownership of Command's share of the crops which he might raise that season on plaintiff's farm until this and other advances should be paid. Under the same arrangement the plaintiff furnished seed and feed for teams to said Command until all of the advances amounted to the sum of \$280.98. After making said agreement, and after said Command had put in all the corn, barley, &c., and had set out one-third of the tobacco, the plaintiff agreed to sell his farm to one George by an executory contract which provided that possession should be given to the purchaser immediately, and that upon the payment of the purchase-money at a later day the premises should be

---

Hadley agt. Barton.

---

conveyed to him. No part of the plaintiff's advances were ever paid. In the fall, after the tobacco was packed and ready for shipment, it was taken by Command, unbeknown to the plaintiff and sold to the defendant who paid for it as follows, one-half to said Command and one-half to said George. Shortly after the receipt of this money Command absconded.

The plaintiff upon learning that the tobacco had been sold to the defendant, demanded one-half thereof of him, and upon his refusal to deliver it or to pay for it, brought this action against him for the conversion of said tobacco.

The case was tried before a referee who reported in favor of the defendant and ordered the complaint dismissed, upon the ground, "that by the arrangement between the plaintiff and said Command the plaintiff did not acquire title to the tobacco in question in this action."

From the judgment entered upon such report this appeal was brought.

*Fuller & Vann*, for appellant.

*Gray & Costello and L. E. Warren*, for respondent.

TALCOTT, J.—The plaintiff claims to have made a contract with John Command, in March or April, 1870, by which Command was to cultivate a certain portion of a farm, then belonging to the plaintiff, during the ensuing season, on shares, but that the plaintiff was to retain the absolute title to Command's share of the crops raised as security for certain advances. In the meantime Command had planted a small part of the tobacco in question in this suit. On the 10th day of June, 1870, the plaintiff entered into a contract with J. M. George for the sale of the farm and all the tools and utensils thereon, with the immediate possession, payment of the purchase-price to be made by installments after the first payment, and on full payment, plaintiff was to give George a full covenant deed.

---

Hadley agt. Barton.

---

It does not appear that Command had any visible possession of any part of the farm at the time of this contract between plaintiff and George, or that George had any notice of any agreement between the plaintiff and John Command.

The recognized rule in this state, in relation to land held under what are termed articles, *i. e.*, executory contracts, purchase-money to be paid at a future day, with the right of immediate possession in the vendee, the legal title to be conveyed on payment of the purchase-money; that the vendee has the rights of a mortgagor in possession.

The vendor is a mortgagee holding the legal title as security for the purchase-money (*Van Wyck agt. Alliger, 6 Barb., 507, and cases cited*).

The transfer of the possession is a transfer of all the incidents of a rightful possession, the rents, issues and profits, and especially the emblements or annual crops.

By the contract with George, without reservation, the plaintiff undertook to and did transfer to the latter the immediate right of possession, and all right to the crops then growing or thereafter to be planted and grown and harvested.

By the transfer, the plaintiff disabled himself from performing any agreement with John Command for cropping on their joint account, and necessarily abandoned that agreement, and was most clearly estopped from setting up any claim to the crops thereafter to be cultivated and harvested on the farm as against his vendee, George.

John and Patrick Command, after the sale to George, went on and planted, cultivated and harvested the tobacco in question. Though there is no evidence of a specific agreement between George and the Commands, yet it is clear that the Commands must have made this crop under some arrangement or license with or from George. John Command states that the tobacco was raised on George's farm, and that one-half belonged to George, and one-half to himself and his brother Patrick.

The defendant is a *bona fide* purchaser for value, without



---

Hadley agt. Barton.

---

any notice of any claim on the part of the plaintiff. He bought of the three, George and the two Commands, jointly, taking one bill of sale from the three. The plaintiff had clothed George with the apparent, and, as we think, with the real title.

The defendant may set up and rely upon the title of any one of his joint vendors. He claims, under George, title to a crop raised on George's farm, without notice of any claim by plaintiff; and the plaintiff is estopped by his contract of sale, with possession, to allege that he retained any interest in the crops.

None of the exceptions as to the admission of evidence were well taken.

The judgment should be affirmed.

E. DARWIN SMITH, *J.*, *dissenting*.—If the agreement between the plaintiff and Command was simply in ordinary phrase, that the latter should work the plaintiff's farm on shares, and they should divide the crops, or the proceeds of the same, this would, doubtless, have constituted them tenants in common in such crops (*Chawnen* agt. *Lusk*, 2 *Lansing*, 212; *Armstrong* agt. *Bicknell*, *idem*, 219; *Tobie* agt. *Shattuck*, 22 *Barb.*, 568; *Tanner* agt. *Hill*, 44 *Barb.*, 428; *Pulman* agt. *Wise*, 1 *Hill*, 234).

But the agreement which the plaintiff proved, and which the referee found to have been made between the parties, in respect to working in common of said farm, does not, I think, involve any such consequences, or create any such relative rights. Parties can make an agreement for the cultivation, by one of them, of the land of another, which does not, in legal effect, make them tenants in common, as between themselves, in respect to the crops, and such an agreement, I think, the plaintiff made in this case with said Command.

These parties, as the referee finds, had some agreement some time in March, 1870, that said Command should work a part of plaintiff's farm on shares.

---

Hadley agt. Barton.

---

The terms of this agreement do not distinctly appear in the report of the referee, or in the evidence. But the referee does find that on the 14th day of April, 1870, the plaintiff signed a note with said Command to secure the purchase-price of a horse, to wit, \$170, and which was paid by said plaintiff under the verbal agreement aforesaid, and which, in his testimony, the plaintiff states as follows: "I was to have the right to and possession of all his (Command's) crops until this and other advances were paid. I furnished seed and feed for the team during the spring and autumn, until I sold the farm, and Command agreed I should have my pay out of the crops, and they should be in my possession until all my advances were paid, and he should take none off without my knowledge and consent."

This agreement was made on the fourteenth day of April, a few days after the arrangement spoken of in March and before the spring work on the farm commenced, as I understand the facts, and was at least a modification of the original contract, or a more specific and full agreement, and must be deemed, I think, to be a substitute for and stand in the place of any other agreement or understanding previously had between the parties. No rights then existed except such as rested on mere verbal understanding or contract, more or less explicit, that Command should work the farm upon shares.

This agreement should be considered, I think, as the final and definite arrangement between the parties in respect to the terms upon which such farm should be worked.

By this arrangement I think it was understood by both parties, and was the contract, in fact, that the crops should belong to the plaintiff till his advances made to the said Command should be paid, and such advances were made on the faith and security of such agreement. There were then no crops in existence. There was nothing upon which a chattel mortgage could operate. An agreement to give a lien on the crops thereafter to grow on said farm, as between the parties, would, doubtless, be valid in equity, and take effect when the

---

Hadley agt. Barton.

---

crops came into actual existence (*Seymour agt. Canandaigua Falls R. R. Co.*, 25 *Barb.*, 305).

The only way in which the plaintiff could effectually secure himself for the advances made and to be made upon such crops not then sown or planted, as they were sowed or planted on his own land, was to reserve and retain the title to such crops till such advances were paid. This the parties must have understood, and their agreement should be construed so as to carry out their actual intent in this particular.

This intent is more clearly expressed in the testimony of the plaintiff, in giving the terms of the contract. Plaintiff testified as follows: "he, defendant, stipulated that I should have my pay out of the crops, and they should remain in my possession and be mine until my advances were paid."

The referee finds this contract, but overlooked in stating it, the fact above stated, that "the crops should remain in my possession and be mine."

There is no reason in the evidence that I can see why these terms of the contract stated by the plaintiff were or should be omitted in the finding of the referee, and I presume it is a mere mistake or casual omission in the statement of the contract in his report.

In accordance with these views the plaintiff had the title to the crops, and the whole title thereto, as between him and the said cropper, Command, and they were not tenants in common in such crops; said Command had to do the work of pulling and harvesting said crops, and had the rights of a cropper to one-half of such crops, as between him and said George, and was to receive from the proceeds thereof, as between him and the plaintiff, one-half of the amount that should remain in the plaintiff's hands after his advances were paid. The parties clearly acted upon this assumption, for it appears that after the agreement aforesaid was made on the eighteenth of April, the plaintiff furnished seed and feed for the team during the spring and summer, and made other advances



---

Hadley agt. Barton.

---

to said Command, in the aggregate, as the referee finds, amounting to the sum of \$270.

If these views are correct the referee erred in dismissing the plaintiff's complaint. The said Command had no title to the tobacco, and of course could give none to the defendant.

Assuming that the defendant was the *bona fide* purchaser of said tobacco from said Command, he could acquire no higher title thereto than Command himself possessed (*Ballard* agt. *Burgett*, 40 *N. Y.*, 314; *Heming* agt. *Hoppock*, 15 *N. Y.*, 409; *Austen* agt. *Dye*, 46 *N. Y.*, 500).

The plaintiff, I think, was entitled to recover for one-half of the tobacco purchased by the defendant of Command, stipulated at the trial to amount to \$280.95, with interest from January 31, 1871.

The judgment should, therefore, be reversed, and a new trial granted, with costs to abide event.

Judgment affirmed.

---

Stern agt. Nussbaum,

---

## N. Y. COMMON PLEAS.

AUGUST STERN *et al.* agt. PHILIP NUSSBAUM.*Discharge in bankruptcy — subsequent promise to pay a debt.*

- A discharge in bankruptcy, under the act of congress of 1867, is a good defense to all liabilities incurred by the defendant prior to the filing of his petition in bankruptcy.
- A creditor, whose rights are affected by such discharge, must resort to the remedy provided by the thirty-fourth section of said act.
- A new promise to revive a debt should be distinct, unambiguous and certain. A declaration which is intended only as an acknowledgment by the debtor of his subsequent indebtedness to the plaintiffs, incurred after the filing of his petition in bankruptcy, is not sufficient to revive any part of the indebtedness covered by the discharge.

*General Term, June, 1874.*

APPEAL from a judgment rendered at special term.

*A. J. Perry*, for appellant.*Jacob A. Gross*, for respondent.

LARREMORE, *J.*—The plaintiffs sued to recover a balance of account, \$240.13, for goods sold during 1865 and 1868.

The defendant filed his petition for a discharge in bankruptcy April 15, 1868, in pursuance of the act of congress passed March 2, 1867, and his application was finally granted September 16, 1868. The plaintiffs do not appear as creditors in said proceedings, and had no notice thereof.

The discharge in bankruptcy was a good defense to all liabilities incurred by defendant prior to April 15, 1868. Such

---

Stern agt. Nussbaum.

---

a discharge cannot be impeached in a collateral proceeding ; but a creditor, whose rights are affected thereby, must resort to the remedy provided by the thirty-fourth section of said act (*Ocean Nat. Bank agt. Olcott*, 46 *N. Y.*, 12). Nor was any subsequent promise to pay the debt so discharged legally established. The only evidence upon this point is found at folio 45 of the case, where one of the plaintiffs testified as follows: "I once asked him (defendant) for money, and he told me he had been discharged in bankruptcy and would give me some money as soon as he got through with that squaring up. I don't know what that referred to."

A new promise to revive such a debt should be distinct, unambiguous and certain. It surely cannot be urged that the testimony in the case meets the requirements of the law in this respect. The most that can be said of it is that defendant's declaration was intended as an acknowledgment of his subsequent indebtedness to the plaintiffs, incurred in September and November, 1868, and after the filing of his petition in bankruptcy.

To the amount of such subsequent indebtedness and interest, \$53.57, the judgment herein should be reduced and affirmed for that amount.

ROBINSON, J., concurs.



---

Sullivan agt. Mayor, &c., of New York City.

---

## COURT OF APPEALS.

MICHAEL SULLIVAN, respondent, agt. THE MAYOR, ALDERMEN  
AND COMMONALTY OF THE CITY OF NEW YORK, appellant.

*Constitutional law—place of janitor not an office—janitor is a mere employe,  
not an officer.*

The tax levy act of 1869, in reference to the city of New York, is not unconstitutional and void. The decision of the general term below deciding the contrary, *overruled*.

The place of janitor is not an office. He is an employe—an attendant; not an officer in any just sense of the word.

Where courts have always required and have had some one or more about them to do just what the plaintiff was appointed to do, his appointment to that labor by a new name is not to make a *new office* for him, even if the place could be called an office, and he an officer.

*October 10, 1873.*

APPEAL from the general term of the court of common pleas. Reported below, 45 *Howard*, page 152.

*D. J. Dean* (for corp. coun.), for appellant.

*Abraham R. Lawrence*, for respondent.

FOLGER, J.—We do not agree with the general term, that the clause in section 11 of the tax levy act of 1869 is unconstitutional and void. That act is a local act. It must be confined to one subject, which must be expressed in its title. If it relates to more than one subject, or if it fails in its title

---

Sullivan agt. Mayor, &c., of New York City.

---

to express that, it is void. The distinction between the provisions in that kind of act which fall within and without invalidity is well shown by the two cases of *Huber agt. The People* (49 *N. Y.*, 132) and *Astor in re* (50 *N. Y.*, p. 363).

The tax levy acts are for the purpose of providing the moneys needful to carry on the municipal government. The purpose is to raise enough for legitimate objects and no more than enough; so that it is within the subject to limit expenditure, that it may not exceed the levy, as much as it is to levy enough that it may come up to a legitimate expenditure. In *Astor in re*, it was held valid to provide a limit to the employment of newspapers, so that expenditure might be kept down. And so in the act under consideration it is proper to restrict expenditure by prohibiting the common council from creating new offices.

It is not within the purpose of such an act to change the organization of the municipal government, nor to organize new courts, nor to change the organization of existing ones. The *Huber* case fell within that category.

But the judgment of the general term is not erroneous in its result. If it be granted that the place of janitor is an office, and he an officer, it does not follow that the office is new. We have lately held in *The People agt. Crooks* that the legislature did not create a new office when by statute it in terms abolished the office of collector of taxes of a certain town, and put in its place the office of receiver of taxes of that town with substantially the same duties, powers and jurisdiction, though with a new name and for a term of three years instead of one year for which the collector held. The office remained the same. So here it is apparent from the necessities of the case, from the act of 1857 cited, and from the testimony in the case that these courts have required and have had some one or more about them to do just what the plaintiff was appointed to do. To appoint him to that labor by a new name is not to make a new office for him.

---

Sullivan agt. Mayor, &c., of New York City.

---

But the place of janitor is not an office; he is an employe, an attendant, not an officer in any just sense of the word.

He lacks the essential incidents of an officer. He takes no official oath; he has no stated duration of term; he is not liable to indictment for official misconduct as such, and in other respects he comes short of being an officer.

The judgment appealed from must be affirmed with costs.

FOLGER, J., reads for affirmance. All agree.



---

People *ex rel.* N. Y. & Harlem R. R. Co. agt. Havemeyer.

---

## SUPREME COURT.

THE PEOPLE *ex rel.* THE NEW YORK AND HARLEM RAILROAD COMPANY agt. WILLIAM F. HAVEMEYER, Mayor of the City of New York.

*Mandamus to compel mayor of New York to countersign warrant—constitutionality of law of 1872, chapter 702—in reference to improvement of Fourth avenue.*

A *peremptory mandamus* ordered requiring the mayor of the city of New York to countersign a warrant drawn by the comptroller of the city pursuant to section 7 of chapter 702 of the Laws of 1872, entitled "an act to improve and regulate the use of the Fourth avenue in the city of New York," notwithstanding the objections:

*First.* That a mandamus was not the appropriate remedy.

*Second.* That the certificate of the superintending engineer includes the cost of temporary tracks for running trains during the progress of the work, and sundry other items, which, though lawful and authorized by the statute of 1872, are not proper to be charged to the cost of the improvement, for one-half of which the city is liable; and

*Third.* That the law is unconstitutional, for sundry reasons and on various grounds urged and stated upon the argument.

*Held*, that there being no disputed question of fact arising upon the application; and no question of fraud or collusion, there was no reason why the court should not dispose of the whole case as involving questions of law only.

Assuming (as the court must in order to dispose of the first, and preliminary objection), the validity of the act of 1872, the doing of the work, the honest expenditure of the money and all the facts set out in the moving papers, a plain duty was imposed upon the respondent (the mayor) by the statute of the state, which was imperative and mandatory, and the non-discharge of which worked gross wrong and injustice to the relator. No other remedy than *peremptory mandamus* was adequate and proper to meet the case.

As to the second objection—the cost of temporary tracks for running trains during the progress of the work, and sundry other items, &c., the act itself is a sufficient answer to it. The second section of which

---

People *ex rel.* N. Y. & Harlem R. R. Co. agt. Havemeyer.

---

authorizes the laying down of "such additional temporary tracks on the Fourth avenue above forty-second street as may be necessary for the railroad business during the progress of the work."

The third objection, that the act is unconstitutional — being a violation of six several clauses thereof, *held*, not tenable. The act was not invalidated by reason of any infringement or violation of that instrument.

*Special Term, First Department, September, 1874.*

APPLICATION for a peremptory mandamus by the relator to compel the respondent, as mayor of the city of New York, to countersign a warrant drawn by the comptroller of the city pursuant to section 7 of chapter 702 of the Laws of 1872, entitled "An act to improve and regulate the use of the Fourth avenue, in the city of New York."

*Henry H. Anderson and Chauncey M. Depew*, for relator.

*Simon Sterne*, for respondent.

WESTBROOK, J.—The New York and Harlem Railroad Company was created by a special act of incorporation, passed April 25, 1831, and various acts amendatory thereof and supplemental thereto, have since been enacted.

Prior to the passage of the act of 1872 (to enforce a duty devolved upon the respondent thereby, as is alleged, is the object of this application), the relator had located, constructed and operated a double-track railroad upon the Fourth avenue, in the city of New York. This was with the consent of the corporation of the city.

By chapter 387 of the Laws of 1859, entitled "An act to extend the charter of the New York and Harlem Railroad Company, and to determine the mode of using the same in the streets of New York," the corporation was "authorized, empowered and permitted to use steam in the drawing of their passenger and freight cars, upon their railroad on the Fourth avenue, to and from the northern extremity of Manhattan or New York Island to the south side of Forty-second street in said city, with turn-outs to their engine houses,

---

People *ex rel.* N. Y. & Harlem R. R. Co. agt. Havemeyer.

---

respectively, for a period of thirty years from the 1st day of December, 1858."

Section 3 of the act just referred to, "extended for the term of thirty years from the passage of this act," "all the rights, privileges and franchises given and granted to the New York and Harlem Railroad Company, in and by their act of incorporation, passed April 25, 1831, subject to all the restrictions of the said act, except as herein modified."

Prior to the said act of 1859, the relator occupied the streets of New York with their railroad track, under a contract with the city, which bore date January 9, 1832. That contract enabled the common council of that city to determine when the railroad should become an obstruction and impediment to the enjoyment of the streets by the public, and to direct the railroad company to provide a remedy therefor under the penalty of the removal of its track.

When the Fourth avenue was originally occupied in part by the railroad, the sparseness of the population was such that such occupation gave but little inconvenience. As the city, however, expanded northward, it was found necessary to provide remedies for the danger and obstruction to the general public resulting from such occupation; and, with a view to a partial remedy, at least, by a law passed in 1867 (*chapter* 880), a portion of the avenue was arched over, leaving the railroad track below, at the joint expense of the city and the company. According to the evidence contained in the moving papers (and this is not denied), the completion of the work authorized by the act of 1867, was of great benefit; not only to the railroad company but to the city; so much so that it was deemed advisable to improve and grade the entire avenue, and, by means of sinking the tracks at points where it was practicable and bridging the avenue at others, to make the use thereof by the railroad company compatible with its proper use as a street by the public. To carry out this scheme the law of 1872, under which this proceeding is pending, was passed.



---

People *ex rel.* N. Y. & Harlem R. R. Co. agt. Havemeyer.

---

By the first section of the act just referred to, the nature and character of the work which "the New York and Harlem Railroad Company is \* \* authorized and required to" do is specified.

The second section authorizes the laying down of "such additional temporary tracks on the Fourth avenue, above Forty-second street, as may be necessary for the railroad business during the progress of the work;" and after providing for the removal of such temporary tracks when the work should be completed, it further authorized the company, "for the purpose of facilitating rapid transit and accommodating local traffic, to lay down permanently two additional tracks on said avenue, and to make such landings-excavations in said avenue as may be required for such additional tracks, with landings for the entrance and delivery of passengers outside of the said excavations and viaduct."

By the sixth section, a board, to be called "the board of engineers of the Fourth avenue improvement," was created, to take charge of, manage and direct the work. It is made the duty of such board "to file a monthly statement, under oath, of the items of their expenditure, with the comptroller of the city of New York." By the same section, the members of the board are named, "Allen Campbell, Alfred W. Campbell, or their successors, and the chief engineer of the board of public works of the city of New York, and the engineer of the New York and Harlem Railroad Company;" directions are given for the keeping of minutes of their transactions; their compensation is fixed; provision is made to fill vacancies, and for the appointment of a general superintendent of the work. They are required to prepare plans and specifications of the improvement "and an estimate of the expense thereof, and file a copy of such plans, specifications and estimates in the office of the comptroller of the city of New York." And they were further required to take an oath, or affirmation, faithfully to perform their duties.

Section 7 provides that one-half of the cost of the work

---

People *ex rel.* N. Y. & Harlem R. R. Co. agt. Havemeyer.

---

shall be borne by the New York and Harlem Railroad Company, and one-half by the city, as the work progresses; and, "when, and as often as it shall appear, by the certificate of the superintending engineer of the work upon said improvement, that the sum of \$25,000 has been expended thereon by the New York and Harlem railroad (specifying the portions and divisions of the said improvement), when the said expenditure has been made the comptroller of the city of New York shall draw his warrant upon the treasury of the said city in favor of the treasurer of the said railroad company for one-half of the said sum, which shall be duly signed and countersigned by the proper officers of the said city, and delivered to the said railroad company for and on account of the one-half of the expense and cost of said improvement, to be borne and paid by the said city, as aforesaid."

Section 8 provides that the one-half of the estimated cost of the improvement which is to be borne by the city shall be raised by taxation upon the real and personal property, and one-half thereof shall be included in the tax-levy of 1872, and the other half in the tax-levy of 1873. The comptroller of the city is directed to issue revenue bonds to meet the amount to be paid by the city; and the section thus concludes: "It is hereby intended and declared that the payments by the city of New York are to be made in the proportion, and as fast as they are made by the said railroad company, during the progress of the work or the said improvement."

By the ninth section the city of New York is "forbidden to obstruct the said improvement, or the use of the Fourth avenue for that purpose, above Forty-second street;" and the common council is "directed to pass and adopt such ordinances as may be requisite or necessary to facilitate the said improvement."

By the tenth section the board of engineers is charged with completing the improvement as rapidly as possible, and when completed the New York and Harlem Railroad Company,

---

People *ex rel.* N. Y. & Harlem R. R. Co. agt. Havemeyer.

---

and such other companies as obtain from it a right so to do, are authorized to run trains, by steam, over the various tracks, &c.

After the passage of this act the relator proceeded, under the direction of the said board of engineers (which board has pursued each and every step required by the law to be taken) to make the improvement.

The city of New York raised by tax, including it in its tax levy of 1872, one-quarter of the whole estimated cost of the improvement; and there was collected and paid into the treasury of the city, the sum of \$1,580,767.50, to meet its share of the cost of the work.

By the act of April, 1873, payments by the corporation of the city of New York must be made through the proper disbursing officer of the department of finance, on vouchers, to be filed in said department, by means of warrants drawn on the chamberlain by the comptroller and countersigned by the mayor. Connected with the finance department is an audit bureau, which, under the supervision of the comptroller, is required to audit, revise and settle all accounts in which the city is concerned as debtor or creditor, the chief officer of which is called the auditor of accounts.

On the 14th day of May, 1874, a certificate, precisely in conformity with the provisions of the act under which the improvement is making, was made out by the superintending engineer, and delivered to the comptroller of the city of New York, certifying that \$276,466.70 had been expended upon the improvement, specifying the portions and divisions of the same where the expenditure was made.

The auditor of the bureau of accounts (Abraham L. Earle) having duly examined the certificate, certified a claim for one-half thereof to the comptroller, which latter officer drew a warrant for one-half the amount of the certificate of the superintending engineer, to wit: for \$138,233.35, and duly signed the warrant; which warrant was also countersigned by the mayor.



---

People *ex rel.* N. Y. & Harlem R. R. Co. agt. Havemeyer.

---

After the mayor (William F. Havemeyer) had countersigned the warrant, which, as before stated, was also signed by the comptroller (Andrew H. Green), he caused his name to be taken therefrom, and now refuses to countersign the same, though he has been requested so to do.

The money wherewith to pay the said warrant was then, and is now, in the treasury of the city, and the application by the relator is for a peremptory mandamus against the respondent, to compel him to countersign the said warrant.

No disputed question of fact arises upon this application; no question of fraud, collusion or attempt to cheat the city out of a dollar is urged. There is no pretense but that the board of engineers has honestly, conscientiously and impartially done its duty, and that the warrant drawn by the comptroller which the mayor now refuses to countersign, represents just one-half the money actually and judiciously expended by the relator in making the improvement required by the law of 1872. On the contrary, the opposition to the mandamus is based upon three grounds only: First, that a mandamus is not the appropriate remedy; second, that the certificate includes the cost of temporary tracks for running trains during the progress of the work, and sundry other items which, though lawful and authorized by the statute of 1872, are not proper to be charged to the cost of the improvement, for one-half of which the city is liable; and, third, that the law is unconstitutional, for sundry reasons and on various grounds urged and stated upon the argument, and which will be noticed in detail hereafter.

The full statement of the facts, which has been given, readily shows that there is here no question of fact to be sent to a jury for trial, and therefore, no alternative mandamus need be granted. The amount of money due from the city has been adjusted, determined and ascertained by a tribunal specially organized and created for that purpose, and which, composed as it was of men of conceded integrity, ability and learning, acting under the sanctities of an oath, was infinitely

---

People *ex rel.* N. Y. & Harlem R. R. Co. agt. Havemeyer.

---

better qualified to discharge that duty than any court or jury possibly could be. Unlike a court, which, to ascertain facts, must rely upon evidence of others, this board had personal knowledge of the truth and right of their judgment, the work having been done under their supervision and according to their plans. Unless, then, this application must fail and be defeated for the objections taken and hereinbefore stated, there is no reason why this court should not and ought not to dispose of the whole case, as involving questions of law only, and, if its views coincide with the position of the relator, grant the writ asked for in a peremptory form.

The objection that a mandamus was not the proper remedy was argued preliminarily and disposed of prior to hearing the argument upon the merits. It may not be improper, however, as this case is one of great interest, to state, briefly, the reasons which influenced that decision.

Assuming the validity of the act of 1872, the doing the work, the honest expenditure of the money and all the facts set out in the moving papers (all of which must be assumed in disposing of this preliminary objection), a plain duty was imposed upon the respondent by the statutes of this state—one which was imperative and mandatory—the non-discharge of which worked gross wrong and injustice to the relator. No other remedy was adequate and proper to meet the case. The tax-payers, and all the officers of the corporation, other than the respondent, had faithfully and completely discharged their various duties. The money had been collected and paid into the city treasury; the auditor, under the direction of the comptroller, had certified to the justice of the claim; the comptroller had drawn his warrant for the amount, and the only obstacle to its payment was the want of a counter-signature by the mayor, who (all this must be conceded in asking a refusal of the writ on this ground), without reason and without cause, declines to affix his name to a warrant, which the law declares he shall do. What other remedy will meet this case? Granting, for the sake of argument, that

---

People *ex rel.* N. Y. & Harlem R. R. Co. agt. Havemeyer.

---

an action could be maintained against the corporation, for labor performed and moneys expended, under the act (which, as the law specially provides for the ascertainment of the claim, the mode of raising the money and its payment, I do not believe), what propriety is there in subjecting the municipality of the city of New York, as well as the relator, to the cost and expenses of an action at law, to enforce a claim which every tax-payer and officer thereof, except the mayor, desires to have paid, and has done all in his power to have discharged.

Within every principle which has ever been held upon the writ of mandamus, it must be the proper remedy. No other will reach the evil, and devolve the costs of the proceeding where they belong, if the points urged upon the merits do not justify the mayor in refusing to perform the official act.

The reasons which influenced us in holding that a mandamus is the appropriate remedy in this proceeding, are fully sustained in *The People agt. The Supervisors of Columbia County* (10 Wend., 263), and *The People agt. Mead* (24 N. Y., 114; see pages 120, 121, 122, 123). In the latter case, judge DENIO, in commenting upon some decisions which have been strenuously urged to this court, says: "But I do not think these cases are fully in point against the plaintiff. None of them present a case of a proceeding prescribed by statute for raising money by a local tax for the benefit of a class of creditors when that proceeding has been carried on according to law nearly to its completion, where it has proved effectual in raising the money from the tax-payers, who were the proper parties charged with its payment, and when the only step wanting to produce satisfaction to the creditor is the payment of the money so raised into his hands. If the defendants are allowed to persist in refusing to make payment on the ground that the relator has a right of action against the town, the anomaly would be presented of the legal pursuit by a creditor of money owing by the town, which it had already raised and collected from the tax-payers and placed



---

People *ex rel.* N. Y. & Harlem R. R. Co. agt. Havemeyer.

---

in the hand of a public officer for the purpose of being paid to its creditors—all in the performance of specific statutory directions—but when, in consequence of the perversity of the official person whose duty it was made to pay it over, it could not be obtained by the creditor.” This is the exact course of argument which influenced us in overruling the motion to dismiss the proceeding upon the ground that the remedy asked for—a mandamus—was not the appropriate one; and with a single further citation from the same opinion of judge DENIO, in which he comments upon the other case we have cited (*The People agt. The Supervisors of Columbia County*) we close the discussion of this preliminary objection: “If the opinion should be thought to go too far in denying the liability of the county to an action, still, the case is an authority for holding that when a particular method of raising money for local public purposes is prescribed by statute, the party entitled to receive it has a right to the full and perfect execution of the power conferred, which may be enforced by the writ of mandamus.”

But it is further objected (and this objection goes to the merits of the application), that the certificate given by the superintending engineer, and for the one-half of which the comptroller of the city drew his warrant, includes items not properly chargeable under the act of 1872 to the cost of the improvement. If this objection be well taken, the amount of the illegal charges embraced in the certificate is of no consequence, and hence the application for a reference to ascertain the exact amount of such improper charges was refused. The certificate could only include such items as the law aforesaid authorized, and if it was made up in part of sums unauthorized, the application for the writ would be refused if such amount was great or small. The items objected to are, 1st. The cost of maintaining temporary tracks to run the trains whilst the work progresses; 2d. The necessarily enhanced cost of doing the work whilst a portion of the avenue is occupied by operating the railroad; and to obviate which it

---

People *ex rel.* N. Y. & Harlem R. R. Co. agt. Havemeyer.

---

is claimed that the trains should have been stopped at the Harlem river. 3d. The construction of two additional tracks to secure rapid transit; and, 4th. The ten per cent, which in the estimate of the entire cost of the improvement, is allowed for contingencies. In regard to the latter item no part of it enters into the certificate for which the comptroller drew his warrant—that representing money actually expended. The appearance of this in the general estimate of the whole cost of the work made prior to the commencement of the undertaking was proper and usual, to apprise those interested of the possible amount of money required. It was placed where it was so that a sufficient sum might be raised to cover any expenditure which the proper performance of the work made necessary, and to make the fund, against which the certificates were thereafter to be given, adequate for their payment. As to the other items something further will be said.

To the second point—that the cost of the work is necessarily enhanced by the occupation of a portion of the avenue during its progress by the operation of the railroad thereon south of Harlem river, and which increased cost by reason thereof, is admitted—the act itself furnishes a sufficient answer, in plain terms. The second section authorizes the laying down of “such additional temporary tracks on the Fourth avenue above Forty-second street as may be necessary for the railroad business during the progress of the work.” From this express permission the inference is irresistible that the work was to be carried on with the Fourth avenue occupied in part by the business of the railroad. The legislature evidently supposed, as we can readily conceive, that the city was vitally interested in the uninterrupted flow of its commerce through this as one of its great arteries, and that such uninterrupted flow was of more pecuniary consequence to it than the enhanced cost caused by its interruption. If allowed to judge of the soundness of this legislative opinion, we would cheerfully announce ours to be in accordance with theirs. But we are not, as the fundamental law of the state

---

People *ex rel.* N. Y. & Harlem R. R. Co. agt. Havemeyer.

---

has wisely committed such considerations to the sound wisdom and practical sense of the legislative department of the government; and it would ill become the judicial branch to say that such discretion could be lodged anywhere with more propriety or more safety.

As to the other two objections—the cost of the temporary tracks and the two additional permanent tracks to secure rapid transit—we think that they are not well taken. The first five sections of the act designated the improvement to be made, and what may and should be done during its progress. Among these is the one which provides for doing the very things, to the imposition of one-half of the cost of which upon the city objection is made. It is impossible to separate these acts from the others which are directed to be performed. After the character, nature and extent of the work has been indicated in these five sections, the next (the sixth) creates the board of engineers, “to execute, direct and superintend the construction of said improvements,” and then sections 7 and 8 prescribe the share of the cost of “the said improvement,” which the city is to sustain, and direct how the money shall be raised and paid out to accomplish the object. No rule of construction would justify the limitation attempted upon the words “the said improvement.” All had been previously specified as a part thereof, or as proper to be done in connection therewith; and if the legislature had intended that the city should bear one-half the expense of only a part of the work previously authorized or directed, it would certainly have so declared, and not use an expression which must necessarily cover all.

Neither does this construction work so great injustice to the city as the learned counsel for the mayor argues. The legislature of the state (*The People agt. Kerr*, 27 *N. Y.*, 188) had power to authorize the relator to occupy the Fourth avenue with its tracks, and prescribe the mode of occupation. The permission to run cars over it, drawn by steam power, had been expressly conferred in 1859. Whatever control the city



---

People *ex rel.* N. Y. & Harlem R. R. Co. agt. Havemeyer.

---

had over its occupation by virtue of the contract with the company, was given to it by the law chartering the company. It was perfectly competent for the same body, under whose permissive authority the city acted, to deprive it of that power and deal directly with the relator. It did so by the act of 1859, which unconditionally conferred the right claimed by the railroad. Such permission was not, as the learned counsel for the mayor argued, subject to the restrictions imposed by other acts, under and by virtue of which the city had undertaken to control the corporation in the use of the avenue; but such restrictions existed only, as the act declares, "except as herein modified." The act having in prior parts made express provision for the laying down of tracks, and the running of cars thereon by steam, and that, too, with the consent of the city, as it expressly declares; such use, granted for a term of years in an unqualified manner, must be deemed to be at least one of the modifications referred to. When the act of 1872 was passed, the legislature had before it the situation and rights of both the city and the relator. The former was vitally interested in the success and maintenance of the latter. The iron rail and the steam horse, which linked it to the great country of which it was the commercial center, were as important and vital to its growth as any of its other avenues which its wealth and enlightened public spirit have constructed. The improvement of this avenue, so as to admit of its use by the public and the railroad together, and the apportionment of the cost thereof upon some just basis, were the problems to be solved. Much of the work to be done properly belonged to the city, and much to the railroad. A separation of the one from the other in its execution would enhance the cost of it as a whole, even though the part properly belonging to each could be accurately designated. Under such circumstances the law was passed by which the work was to be prosecuted as a unit, under one plan and a single superintendence, while the cost was equally divided between the two. If a part of the whole

---

People *ex rel.* N. Y. & Harlem R. R. Co. agt. Havemeyer.

---

can be selected and an argument based upon it to prove the city pays a part of something it ought not to bear, so, on the other hand, doubtless, the railroad company might argue, as to some other part, that it paid for something which benefited the city only. The truth is that the work so runs together that its separation is impossible; and since the propriety of its execution is conceded by all, the apportionment of its cost could only be made by the legislative power in the exercise of its best judgment. We think it has acted wisely, equitably and justly; but if it has not, neither this nor any other tribunal has power to correct its errors. The work, when completed, will certainly not benefit the railroad company only, but the city equally as much. The exact proportionate benefit which each will receive can never be accurately ascertained. It is enough to know that both will feel that the money expended has been judiciously employed, and a division made of its cost by a body empowered to decide that question.

Having endeavored to show that the remedy sought is an appropriate one, and that, if granted, the city will not pay anything unauthorized by the law of 1872, let us now examine the various objections founded upon our federal and state constitutions. It is claimed:

First. That it violates the clause of our national constitution, forbidding any state to pass a law impairing the obligations of any contract. It is argued that as the contract of January 6, 1832, between the city and the company, gave to the former the right to control the use of the avenue by the latter, the act of 1872, which takes from the city this power of control, substantially abrogates this agreement. To this we answer: First, whilst discussing the previous objections, it was shown that the contract was annulled with the consent of the city, by the law of 1859, which definitely conferred the right to use the avenue by the propulsion of cars, over the tracks constructed upon its surface, by steam. This grant was absolute, and absolved the company from its con-

---

People *ex rel.* N. Y. & Harlem R. R. Co. agt. Havemeyer.

---

tract of 1832, which had therefore ceased to exist when the present statute was passed; second, assuming that the old contract of 1832 was in force when the present statute was passed, it was competent for the city, if the old agreement was thereby improperly nullified, to make its objections. It, as a natural person, can waive its right, and assent to a change or modification of its bargains. Like a natural person, it cannot fold its arms and make no objection when it ought to speak. It saw the machinery of the law being put in operation by an estimate of the cost of the work filed in the office of its chief financial officer, and in all that was done before the work began, and in the conduct of the same to the present time, one of its own principal officers (the chief engineer of the board of public works) took a leading and active part. No objection or notice is given to the relator that the provisions of the law are not in good faith accepted; on the contrary, it is allowed to make a contract, on the faith of a supposed acquiescence by the city, involving millions—the tax imposed is levied, collected and paid into the city treasury—hundreds of thousands of dollars are paid by the city in ratification of the new agreement which the law embodies; and now, at this late day, this objection is made after every tax-payer and every officer of the city—not even excepting the mayor, who is now objecting—has expressly ratified and confirmed it. So far as it is possible for any being, natural or artificial, to waive any prior agreement, if one existed, the city of New York has done so, and the point now, for the first time taken, cannot prevail. But, third, the city has no rights under the contract of 1832, so far as the use of this avenue by the relator is concerned, which the state was constitutionally bound to respect. The city, as we have shown under a previous point (*People agt. Kerr*, 27 N. Y., 188), had control over the occupation by the railroad of the street by the force of a power conferred. The body which gave it the power could withdraw it and exercise



---

People *ex rel.* N. Y. & Harlem R. R. Co. agt. Havemeyer.

---

it for itself. It has done so, and that takes no inherent or vested right from the city.

Second. It is said that it violates section 16 of article 3 of the constitution of this state, which declares: "No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in its title." The title of the act is "An act to improve and regulate the use of the Fourth avenue in the city of New York." The cases of *Brewster agt. City of Syracuse* (19 N. Y., 116), and of *Ferdinand agt. Mayor* (50 N. Y., 504), cover this objection. In the latter case it is decided, "if the title of an act fairly and reasonably announces the subject, and that is a single one, and if the various parts thereof have respect or relate to that subject, the provisions of the constitution that no local or private bill shall embrace more than one subject, and that shall be expressed in the title (*state constitution*, art. 3, § 16), is complied with. The degree of relationship of each provision is not essential if it legitimately tends to the accomplishment of the general purpose." And it was also in that case further held, "the general subject of local improvements includes not only the plan and construction of contemplated work, but the means by which the work may be accomplished, the proceedings necessary to be adopted for assessing and paying the expenses, and the remedies to parties for redress of grievances arising out of their construction." Tested by these rules there is no difficulty. When this law was passed, the public and the railroad company were in the joint use of this avenue, and the act declared by its title its object to be to "improve and regulate" its use. No improvement could be made without cost to some one, and the reader of such title would naturally conclude that a tax would be levied somewhere to pay such cost; and as the use was principally confined to the two corporations, it could reasonably be conjectured where it would fall. And further, as the public and the railroad were both using the avenue, the portion of

---

People *ex rel.* N. Y. & Harlem R. R. Co. agt. Havemeyer.

---

the title which indicated that its use was to be regulated would naturally direct attention to the body of the act to ascertain how it was thereafter to be used. Every section of the act relates to this single object, and the title could not be made any more specific without incumbering it with the details of the machinery devised for its execution, which the framers of the constitution did not contemplate, and did not intend.

Third. It is further argued that the law is in conflict with section 13, article 7, of the constitution, which declares: "Every law which imposes, continues or revives a tax shall distinctly state the tax, and the object to which it is to be applied, and it shall not be sufficient to refer to any other law to fix such tax or object."

If this objection is to prevail, what becomes of all the various statute laws authorizing city and village corporations throughout the entire state to make local improvements, appoint boards to assess and determine the cost, &c.? What of various others creating special commissioners to ascertain and assess debts and damages due third parties from counties, towns, &c., and then directing the levy and assessment thereof upon the locality which should pay? If the legislature can authorize a municipality to make an improvement, appoint commissioners to ascertain and distribute its cost among those which in their judgment should bear it, and in such proportions as they think proper—why can it not, instead of delegating such power to others, act directly, and determine that a certain improvement shall be made, establish a board to direct and control its execution, apportion its cost as it thinks proper, and provide for its payment? Is there any greater exercise of power in one case than in the other? If the power to do an act can be legally conferred, the body which can make the grant can exercise the right itself.

In *People agt. Mayor of Brooklyn* (4 N. Y., 420), by virtue of the power conferred in the charter of the city, Flushing

---

People *ex rel.* N. Y. & Harlem R. R. Co. agt. Havemeyer.

---

avenue had been improved, and the cost of the improvement assessed in part upon certain parties supposed to be especially benefited, it was held this was a proper exercise of the taxing power. Will it be argued that, if an act of the legislature had directly ordered the same improvement, had created a board to plan and execute the work, and had declared in the law itself what proportion of the cost the whole city should pay and what part specific corporations and individuals should bear, that such act would not be equally valid with the one it did pass?

In *Town of Guilford agt. The Supervisors of Chenango County* (13 N. Y., 143), it was held that a law of the state appointing commissioners to ascertain the amount due from the town to certain parties, and directing the assessment of the amount awarded by the board of supervisors of the county upon the town, was a valid and constitutional enactment. That case, which, like the one we are considering, provided for the assessment of a tax, the amount of which was to be ascertained by the means specified therein, was certainly unconstitutional if the act of 1872 is, for the reason we are discussing.

Whatever plausibility the objection may have from the words of the section and article of the constitution upon which the same is predicated, and whatever apparent contradiction there may be between it and the case we have cited, are explained by the remarks of DENIO, Ch. J., in *Darlington agt. Mayor, &c., of New York* (31 N. Y., 164; see pages 182, 183), who, in commenting upon the same article of the constitution to which the learned counsel of the mayor has referred, says: "The article of which the section is a part relates to the state finances, and, taken together, it constitutes the financial systems of the state, so far as concerns constitutional restraints. The affairs of cities and counties, so far as they are regulated by the constitution, are treated of in other provisions." And precisely this explanation disposes of *People agt. Board of Supervisors of Kings County* (52 N.



---

People *ex rel.* N. Y. & Harlem R. R. Co. agt. Havemeyer.

---

Y., 556), in its applicability to the case before us. The court had then before it a law imposing a state tax for state purposes, and that law was, of course, amenable to the article of the constitution regulating that species of legislation. Its soundness is not questioned, but it does not sustain the point urged now.

Fourth. The objection that the creation of the board of engineers to superintend this work is a violation of article 10, section 2, of the constitution, in relation to the appointment of certain officers, cannot prevail. If the point be well taken, then *The Town of Guilford* agt. *The Board of Supervisors of Chenango County* (13 N. Y., 143), before cited, was wrongly determined. In that case the court of appeals had before it the constitutionality of a law appointing commissioners to determine the amount of a tax to be levied. So, also, if the position be sound, *Litchfield* agt. *Vernon* (41 N. Y., 123) and *People* agt. *Lawrence* (41 N. Y., 137) were wrongly decided. In these cases the constitutionality of an act creating a special board of commissioners to do certain things relating to the closing of the Atlantic street tunnel in the city of Brooklyn, and to assess the cost thereof, was affirmed.

It would not be difficult to answer the objection were it an original question; but such a discussion is neither profitable nor necessary in view of adjudged cases, which this court has no power to reverse.

Fifth. Neither is the law obnoxious to the first article of the constitution, section 9, which provides: "The assent of two-thirds of the members elected to each branch of the legislature shall be requisite to every bill appropriating the public moneys or property for local or private purposes." No "public moneys," in the sense in which the word "public" is used in that part of the organic law, are appropriated so as to make a two-thirds vote of the legislature necessary. The use of the words "public" and "local" in the same section forbids the thought that they are synonymous expressions, and the structure of the whole sentence is in opposition to

---

People *ex rel.* N. Y. & Harlem R. R. Co. agt. Havemeyer.

---

the construction which attaches to each a similar meaning. It was very easy to say, if that was the thought intended, that "no tax shall be imposed for a local or private purpose upon the state or a locality, except by the vote of two-thirds of the members elected to each branch of the legislature." Instead of that, the expression indicates, as well as the requirement, that the assent of two-thirds of the members was necessary when the money belonging to the whole state was to be appropriated for the benefit of a part. This construction makes the provision reasonable and proper, and demonstrates that the "public moneys" referred to in the section are those belonging to the state, and that the clause of the constitution cited is no limitation upon the power of the legislature to assess or tax the cost of a local improvement upon a locality. Neither by the law is any "private property \* \* \* taken for any public use," so as to make article 1, section 6, of the constitution applicable. Taxation upon a locality for an improvement therein is the exercise of a different power — the taxing power — whilst the constitutional provision just cited refers to the taking of property by the right of eminent domain. This distinction, ever since the able and exhaustive opinion of RUGGLES, J., in *People agt. Mayor of Brooklyn* (4 N. Y., 419), wherein it is most clearly stated and explained, has been well recognized in this state, and repeatedly followed since.

Sixth. The last objection urged is that "chapter 702 of the Laws of 1872 is also unconstitutional and void in so far as it imposes the payment of this money upon the city of New York for the benefit of the Harlem Railroad Company, as the compelling of such payment is beyond the scope and purview of the legislative power."

Assuming the truth of the statement contained in the point urged, that the tax is for "the benefit of the Harlem Railroad Company," the objection is still without force. There is no such limitation on the taxing power of the legislature. In *Town of Guilford agt. The Supervisors of Chenango County*

---

People *ex rel.* N. Y. & Harlem R. R. Co. agt. Havemeyer.

---

(13 *N. Y.*, 143) before cited, in answer to an objection that the law imposing the tax was a mere gift to the parties in whose favor it was imposed, judge DENIO said: "The legislature is not confined in its appropriation of the public money, or of the sums to be raised by taxation in favor of individuals to cases in which a legal demand exists against the state. It can thus recognize claims founded in equity and justice, in the largest sense of these terms, or in gratitude or charity." In *Litchfield* agt. *Vernon* (41 *N. Y.*, 123), also before quoted, judge GROVER (*page* 134), speaking of the previously cited case, says: "In that case it was held that the legislature had the power to impose a tax upon the inhabitants to pay a claim that had no legal validity, and that could in no way be enforced against the town. In other words, that it was in the power of the legislature to impose a tax upon a locality for any purpose deemed proper, and that its power, in this respect, is not restricted by the constitution of the state." The opinion of MASON, J., in *People* agt. *Lawrence* (41 *N. Y.*, 137, *see pages* 140, 141, 142), is to the same effect. The case of *People* agt. *Batcheller* (53 *N. Y.*, 128) does not conflict with these views. It simply decides that a law requiring a town, without the consent of its inhabitants, to become a stockholder in a railroad company, is unconstitutional.

But the objection assumes a fact which is not true. The provisions are not for the benefit of the relator, exclusively. This we have heretofore endeavored to show in this opinion. The proper improvement and use of the avenue by both the city and the railroad, and to make the one consistent with the other, were the results to be obtained. What part of the work justly belonged to the city, and what to the relator, it was difficult to define with accuracy; and the work to be done by each was so interlaced, that it was deemed wise to direct its construction under a single plan. Perhaps, from parts of this work the railroad receives the larger benefit, and from others the city. The legislature in its wisdom has assessed the one-half part upon each. This power is nothing different from



---

People *ex rel.* N. Y. & Harlem R. R. Co. agt. Havemeyer.

---

what is exercised in behalf of municipal corporations every day. A street is opened and graded through agricultural lands. In such a case the amount to be paid by the city or village, as a whole, is always considerable, and yet the objection was never made, or if made, has never prevailed, that it was unconstitutional to tax the entire municipality for work, a part of which, at least, benefited individuals only. Such owners are presumed to pay for that part which specially benefits them in the assessments, which they pay for such benefits over and above their share of the general tax, to which they also contribute. So in this case the legislature has determined that one-half the cost of the improvement, over and above its proportion of the tax levied upon the city, should be paid by the relator as its share of the peculiar benefits resulting therefrom. It is not for this court to say that this apportionment is unjust. To that body, as the supreme arbiter under our constitution, has the right to decide been committed, and with its decision this court has neither the power or inclination to interfere. Doubtless, in the exercise of these great powers they will often err, as any tribunal, which is but human, will; but no system of government has ever yet been devised, and none ever will be established, which shall, in any department, always do exact justice, and whose lawful powers, if stretched to their fullest extent, might not work injustice in particular cases. In the grant of power, much must be conceded to the discretion, good sense and integrity of the individual or body to whom it is granted; but the concession of that which is fairly given should never be withheld, because extreme cases can be supposed in which it might be exercised with danger to the public. Practically, it will generally be found that the danger is largely imaginative, and the injury claimed to be done scarcely perceptible.

Before closing this opinion, it may be well to advert to another view, applicable as much to each of the objections urged, as to the particular one in connection with which it has been hereinbefore stated.

---

People *ex rel.* N. Y. & Harlem R. R. Co. agt. Havemeyer.

---

Statutes and constitutional rights existing in favor of a party, natural or artificial, may be waived. May not the act of 1872 be regarded as the embodiment of an agreement between the parties, to which all have assented—upon which all have acted—and the withdrawal of either from which cannot be permitted, because by its conduct it has induced the other to incur responsibilities which, it may fairly be assumed, would not have been incurred if the other had not assented? The relator accepted the law by making the contract for the work, which the act required it to make. The city, through its officers, accepted it, by no protest against its provisions; by allowing the chief engineer of its board of public works to become a member of the board of construction, which directed the work and controlled the expenditure; by using its machinery for the collection of taxes, to assess, levy, collect and receive into the city treasury its one-half of the cost; by drawing warrants and paying over a million dollars thereon; and, through its citizens, by the payment of the tax levied for the city's share of the cost. Thus, all parties have agreed,—the city through every officer and every tax-payer. No rule of law and no rule of honesty, should permit objections to prevail which have been so fully and explicitly waived.

As against the respondent, however, the strength of the point founded upon the acquiescence of the city in the law of 1872, has not yet been stated. Every tax-payer in the municipality has not only assented to the act, but actually executed it. As a law imposing a tax, if it may be so regarded, it has already spent its force by the assessment and collection thereof, and the obtainment of the money for this purpose only. Every tax-payer has actually paid his, her and its proportion of the amount which the city was to pay of the cost of this great improvement into the city treasury, and all, except that part which has been paid over in execution of the law, still remains therein pledged to this object. It cannot be used for any other purpose without a fraud upon the parties from whom it was collected, and who paid it that this work should

---

People *ex rel.* N. Y. & Harlem R. R. Co. agt. Havemeyer.

---

not fail. When the mayor refuses to countersign this warrant as the law commands, he refuses, not in order to protect his constituency from money oppressively to be taken against their will, but to defeat their wishes, and to appropriate their means to some use other than that to which they have pledged and dedicated it. His action in so doing is not only contrary to the desire of the relator, but to that of the body of the people whom he professes to represent and whose voice he should obey. The citizens of New York have a right that their means shall be used for the very purpose to which they have applied them, and none of their officers should be allowed to refuse to execute the trust which tax-payers, under the law, have committed to their official hands, in the belief that the provisions of such trust would be faithfully executed.

The result of my examination is, that the peremptory mandamus asked for should issue.



---

Stewart agt. Orvis.

---

## N. Y. SUPERIOR COURT.

ASA B. STEWART agt. JOSEPH U. ORVIS and others.

*Mutual mistake of fact — sale of a worthless note — receiving it back.*

Where a promissory note was delivered by the defendants, note brokers, to the plaintiff who was also a note broker, for sale, and the plaintiff sold the note to a customer of his, all parties believing at the time that the drawers of it were solvent, when in fact they were then insolvent, and the purchaser on learning that fact immediately called upon the plaintiff with the note, and the latter received it back and returned to the purchaser the consideration paid for it:

*Held*, that the defendants were liable to the plaintiff for the amount of the note; for, in accepting a return of the note and repaying the money to the purchaser, the plaintiff did no more than the defendants, who had acted through him, were bound legally and in conscience to do — the plaintiff had succeeded to all the rights and remedies of the purchaser.

DEMURRER to complaint.

VAN VORST, *J.* — The note was delivered by the defendants who were note brokers to the plaintiff, who was also a note broker, for sale. The plaintiff made the sale to a customer in pursuance of such employment and paid over the consideration to the defendants.

Both the plaintiff and defendants, as well as the person to whom the note was sold, believed at the time of the sale and purchase, that the parties to the note were wealthy firms, engaged in business and had not suspended payment. The truth was that they had stopped payment, and were insolvent at the time. The note was sold by plaintiff at the usual rate of discount for notes of solvent persons, who were paying their commercial paper when due.

---

Stewart agt. Orvis.

---

Here was a mutual mistake of material facts which entitled the injured party, if moving seasonably, to a rescission and return to him of the consideration paid on the surrender of the note (*Houghton* agt. *Adams*, 8 *Barb.*, 545; *Baldwin* agt. *Van Deusen*, 37 *N. Y.*, 487; *Roberts* agt. *Fisher*, 43 *N. Y. R.*, 159).

Immediately after the facts were discovered by the purchaser of the note he tendered the same to the plaintiff, who only was known to him in the transaction, and demanded that the sum paid by him should be refunded. The plaintiff, received the note and refunded the amount paid him by the purchaser.

The plaintiff immediately tendered the note to the defendants and demanded the return of the money paid to them therefor, and which they still held. The defendants promised to refund the money but have failed to do so.

The return of the note by the purchaser to the plaintiff, who had made the sale and received the money as the defendants' agent, and who on demand had repaid the consideration, renders the defendants liable to him for the money paid on the return of the note.

For in accepting a return of the note and repaying the money to the purchaser the plaintiff did no more, than the defendants themselves who had acted through him were bound legally and in conscience to do. By such repayment the plaintiff succeeded to all the rights and remedies of the purchaser in the premises, arising from the facts and circumstances of the case.

The justice of the plaintiff's claim is admitted by the defendants themselves, for as is alleged in the complaint, upon the tender to them of the note by the plaintiff they promised to refund the amount paid by him. This would seem to be an approval of what he had done in receiving back the note.

There should be judgment for the plaintiff on the demurrer with liberty to defendants to answer on the usual terms.

---

Fall Brook Coal Company agt. Lynch.

---

## SUPREME COURT.

THE FALL BROOK COAL COMPANY agt. ELLEN B. LYNCH,  
impleaded, &c. \*

*Change of venue — in action by non-resident corporation — constitutional act.*

The act of 1873, chapter 139, Session Laws, 1873, page 237, provides that "while said Fall Brook Coal Company shall have an office and place of business in this state, they may sue and be sued the same as if they were a corporation of the state of New York, and for that purpose shall be deemed a resident corporation of this state."

The plaintiff being a corporation organized under the laws of the state of Pennsylvania, brought this action against the defendant, a resident of the county of Onondaga in this state, and laid the venue in the county of Schuyler, in this state, where it kept an office and place of business. The defendant duly made a demand that the place of trial be changed to the county of Onondaga, which was refused, and thereupon the defendant moved to thus change the place of trial.

*Held*, that although the subject of the bill is not expressed in the title, the act cannot be regarded as "private or local," within the meaning of the constitution, and is therefore not unconstitutional.

The plaintiff having in all things complied with the provisions of said act relating to its keeping an office and place of business within the county of Schuyler, the motion must be denied.

*Chenango Special Term, July 28th, 1874*

THIS was a motion to change the place of trial in this action from the county of Schuyler to the county of Onondaga, upon the ground that the latter was the proper county.

The moving papers show that the plaintiff is a corporation organized under the laws of the state of Pennsylvania; that the defendant is a resident of Onondaga county, and that demand of a change of venue to the proper county was duly made.



---

Fall Brook Coal Company agt. Lynch.

---

It was conceded upon the argument of the motion that the venue could be retained in the county of Schuyler only by virtue of the act of the legislature of the state of New York, passed March 26th, 1873 (*chap. 139, p. 237, Session Laws of 1873*), amending the act of April 15th, 1864 (*chap. 192, p. 382, Session Laws of 1864*).

It further appeared that the plaintiff had in all things complied with the provisions of said acts, relating to its keeping an office and place of business within this state.

*M. J. Sunderlin*, for plaintiff.

*Irving G. Vann*, for defendant.

COUNTRYMAN, *J.*—This application must be denied, unless the act of 1873 (*chap. 139*) is in conflict with article 3, section 16 of the constitution. The subject of the bill is not expressed in the title, and the act is therefore void, if it can be regarded as “private or local” within the meaning of the prohibition (*People agt. Hills*, 35 *N. Y.*, 449; *People agt. O'Brien*, 38 *N. Y.*, 193; *Gaskin agt. Meek*, 42 *N. Y.*, 186; *People agt. Allen*, 42 *N. Y.*, 405). It manifestly is not a local statute (*People agt. Supervisors of Chautauqua*, 43 *N. Y.*, 11, 14, 21). Is it a private act? A private bill relates only to particular persons or particular classes of men and their private concerns (1 *Black. Com.*, 459; *Potter's Dwarrris on Statutes*, 53; 2 *Burrill's Law Dic.*, 335). This act provides that “while said Fall Brook Coal Company shall have an office and place of business in this state, they may sue and be sued the same as if they were a corporation of the state of New York, and for that purpose shall be deemed a resident corporation of this state.”

The act clearly confers a benefit upon the plaintiff in permitting it to enjoy the privileges of a resident corporation, for the purpose of bringing suits in its own behalf, and as an incident thereof, the right claimed in this action of desig-

---

Fall Brook Coal Company agt. Lynch.

---

nating the place of trial in the county where its office and place of business is located. But in the same connection and as a part of the same provision it also confers the correlative right upon all other residents of the state in permitting the plaintiff to "*be sued* the same as a corporation of the state of New York." Independently of this statute it is very doubtful whether the plaintiff could have been sued in lower courts of judicature (*Paulding* agt. *Hudson Manufacturing Company*, 2 *E. D. Smith*, 38; *Aken National Steamship Company*, 8 *Abb. [N. S.]*, 283, 285; *Whitehead* agt. *Buffalo & Lake Huron R. R. Co.*, 18 *How.*, 218; *International Life Ins. Co.* agt. *Sweetland*, 14 *Abb.*, 240). The right to sue the plaintiff in the same manner as a resident corporation was not a privilege or benefit conferred, but a new liability imposed upon it for the benefit of residents of the state, and is a provision in which all the people of the state may be interested. It is a liability imposed for the benefit of the creditors and all persons having dealings with the company, in the general management of its business and affairs. In this respect the act relates to the general welfare of the people at large and may affect the whole community; and it must therefore be regarded as a public statute (*People* agt. *Supervisors of Chautauqua*, 43 *N. Y.*, 11, 14, 20; *Williams* agt. *The People*, 24 *N. Y.*, 405, 407; *In Matter of De Vancene*, 31 *How.*, 289, 337 and 338; *Burnham* agt. *Acton*, 35 *How.*, 48; *Sedgwick on Stat. and Com. Law*, 32, 34).

Being of a public character this provision of the act cannot be affected by the constitutional prohibition (*People* agt. *McCann*, 16 *N. Y.*, 58).

Ordinarily where separate and distinct subjects of legislation are contained in a statute which are not expressed in the title, some of which are private or local and others public or general, the former will be condemned and repudiated while the latter are upheld and enforced by the courts. But after careful consideration, I am constrained to hold that the present case must be regarded as an exception to the rule. It would

---

Fall Brook Coal Company agt. Lynch.

---

be a palpable violation of every principle of justice and sound policy, if not of the fundamental law, to subject a party to the liability of being sued without conferring in return the right to sue and prosecute claims in our courts. The right to sue is an incident of the liability imposed of being sued the same as a resident corporation. These rights to the company on the one hand and the public on the other are necessarily connected together in the same provision, and fall under one general head or subject within the meaning of the constitution. I am therefore led, after some hesitation, to the conclusion, that the act is not in conflict with the constitution. The motion must be denied with ten dollars costs.

Motion denied.



---

Leggett agt. Hyde.

---

## COURT OF APPEALS

ABRAHAM LEGGETT and another, respondents, agt. GEORGE M. HYDE, impleaded, &c., appellant.

*What constitutes a partnership as to creditors—interest in the profits*

Where an agreement was made by a partnership firm with a third person, that in consideration of a loan made by the latter to the firm of a certain sum of money, for one year, the firm would pay such person one-third of the profits of their business to be settled half yearly; and at the end of the year take him in as a partner, if the firm and he should feel satisfied, on his making further investments and putting in more capital:

*Held*, that by the agreement such person had a specific interest in the profits as profits, and became a *partner* as to the creditors of the firm and as to third persons. (CHURCH, *Ch. J.*, *dissenting*.)

*Roger A. Pryor*, for appellant.

*C. Van Santvoord*, for respondents.

FOLGER, *J.*—At the trial each party asked the court to direct a verdict in its favor. Each thereby conceded that there could be no dispute upon any question of fact; each thereby conceded that there was left for decision only a question of law, and that it arose upon a settled and uncontradicted state of facts.

Taking the view of the testimony the most favorable for the appellant, the facts are these: In 1869 one Putnam and Henneberger were partners in business, under the firm name of A. D. Putnam & Co. In that year the appellant invested or deposited with that firm \$1,500. This sum was credited, on its books, to Frederick Hyde, the son of the appellant;

---

Leggett agt. Hyde.

---

for this sum the appellant was to share in the profits of the business of the firm. His share was to be one-third, and demandable by him at the end of the year. At the end of the year his share of the profits was \$500. This sum was also placed to the credit of Frederick Hyde; then, in 1870, the appellant loaned to the firm, for one year, the original sum of \$1,500 and the \$500 of profits, thus making \$2,000. In consideration of this loan the firm agreed to hire Frederick Hyde as clerk, at ten dollars per week, for the year; to pay the appellant one-third of the profits, which were to be settled half-yearly, and at the end of the year to take him in as a partner, if the firm and he should feel satisfied, on his making further investments and putting in more capital. Though it is nowhere in the testimony so stated in terms, yet it is fairly to be inferred that the \$2,000 was loaned to be used in the business, and that if, at the end of the year, the appellant did not become an ostensible partner he was to be repaid out of the concern the \$2,000, but without interest strictly as such. The appellant never interfered in the affairs of the concern, nor exercised any control in the business. At the end of the first six months there were no profits of the business. The appellant never received anything for his \$2,000, nor anything by way of interest money.

The prominent and important facts are, that he loaned the firm a sum of money to be employed as capital in its business, and that, therefore, he was entitled to have and demand from it one-third of the profits of its business every half-year. In my judgment, there results from this that Putnam and Hennessee, making use of that money as capital in that business, used it there for the benefit of the appellant; because any return to him for the loan to them must come from the use of it. If not used so that profits were made, he got no return. Further, that he had interest in the profits which, while they were anticipatory, was indefinite as to amount, but when they were realized, was measured and specific as to share. Further, that his interest in them was in them as

---

Leggett agt. Hyde.

---

profits; that is, that he had a right, on the lapse of every six months, though having no property in the whole capital, to have an account taken of the business, and a division made of the profits, then appearing (*Ex parte Hampen*, 17 Vesey, 403); that he had this right to an account and a division at other time than at the end of each six months, if, at any other time, the exigencies of the concern — as the dissolution of the firm by death of one partner, or any other reason — required an account to be taken. He had that interest in the profits, as profits, because he could claim a share of them specifically, as they should appear on each six months' or other accounting of the business of the term then ended, and could then have and demand payment of his share. By the terms of his contract with the firm, if it be upheld as made, he was interested in and affected by the results only of the year, as ascertained at the end of each six months. It would not affect him in this right to account, though the business of a previous year had been disastrous. If either six months' business should yield a profit, he could insist on payment to him of one-third thereof, and could demand that an account be had of the business of any six months, to ascertain if there had been profits. It was one-third of the profits that he was to have, and not a sum in general equal to that one-third; so that he was to take it as profits, and not as an amount due, — not as a measure of compensation, but as a result of the capital and industry. So it is said in *Everett agt. Coe* (5 Denio, 182): "If he is to be paid out of profits made, then he has a direct interest in them." And see *Ogden agt. Astor* (4 Sandf., 321, 322). The learned counsel for the appellant states the question of law to be this: Does a loan of money, with an agreement for compensation from the profits of the business, *per se* constitute the lender a partner *quoad* the creditors of the firm? Is this statement of it correct? Does the phrase "compensation from the profits" fully meet the case? Does it fully present the fact that by the agreement the appellant obtains an interest in the profits, as such, and a



---

Leggett agt. Hyde.

---

right to insist upon an accounting and a division thereof half-yearly? With this supplement, the question for decision is as stated by him.

I am not to say what I think ought to be the answer to it, was this a case of first impression. I am to declare what I ascertain to be the answer already given by the law in this state, as it has been settled, and declared by the authorities. The argument of the learned counsel is very ingenious, and very forcible when considered in reference to what should be the proper rule, and what the true reasons upon which a rule should be founded. Yet if it is found that, by a long course of decisions or by long acquiescence in and adherence to a rule some time ago authoritatively promulgated, there has been established a principle of commercial law upon which the community has acted, it is the duty of the courts to adhere thereto, leaving it to the law making power to find a remedy, if remedy be needed, in a positive authoritative enactment. In England this has been done, and by act of parliament an important change has been made (28 & 29 *Vic.*, *ch.*, 86). In the first place it matters not that the defendants meant not to be partners at all and were not partners *inter sese*. They may be partners as to third persons, notwithstanding (*Manhattan Brass Co. agt. Sears*, 45 *N. Y.*, 797), and this effect may result, though they should have taken pains to stipulate among themselves that they will not in any event hold the relation of partners. Among the reasons given, is this, whether it be strong or weak: That whatever person shares in the profits of any concern shall be liable to creditors for losses also, since he takes a part of the fund which in great measure is the creditors' security for the payment of debts to them (*Waugh agt. Carver*, 2 *H. Bl.*, 235, *citing Grace agt. Smith*, 2 *Black.*, 998). The doctrine took its rise in the decisions in these cases. And commenting upon them, the text writers who have presented most forcible criticisms upon it say: "The principle laid down by LEE GRAY, C. J., in *Grace agt. Smith*, has served as the

---

Leggett agt. Hyde.

---

foundation of a long line of decisions which cannot now be overruled by any authority short of that of the legislature; and in all cases in which there is no incorporation, nor limited liability, it must still be regarded as binding on the courts" (*Lindley on Part.*, 36). "The doctrine is completely established upon the very ground asserted in *Grace agt. Smith (Story on Part.*, sec. 36, note 3), and so Mr. Parsons, in his book on Partnership, quoting lord ELDON, *ex parte Hamper*: "But if he has a specific interest in the profits themselves, as profits, he is a partner," adds: "Undoubtedly he is; every principle of the law of partnership leads to this conclusion." He contends, however, that the specific interest in profits which is to make a person a partner must be a proprietary interest in them existing before the division of them into shares. See also 1 *Kent's Commentaries* 25 note v, where it is said: The test of partnership is a community of profits — a specific interest in the profits as profits — in contradistinction to a stipulated portion of the profits as a compensation for services.

The courts of this state have always adhered to this doctrine and applied or recognized it in the cases coming before them. In *Walden agt. Sherburne* (15 *J. R.*, 409), in 1819, SPENCER, J., delivering the opinion of the court, says: "No principle is better established than that every person is to be deemed in partnership if he is interested in the profits of a trade, and if the advantages which he derives from the trade are casual and indefinite, depending on the accidents of trade. See also *Dob agt. Halsey* (16 *J. R.*, 34), in the same year. The principle is recognized in *Chase agt. Barrett* (4 *Paige*, 148), by WALWORTH, chancellor; in 1833 by the court of errors, per WALWORTH, Ch.; in 1837 in *Champion agt. Bostwick* (18 *Wend.*, 175); by the supreme court in 1841, per COWEN, J., in *Cushman agt. Bailey* (1 *Hill*, 526); and again in 1848, per BEARDSLEY, Ch. J., in *Everett agt. Coe* (5 *Denio*, 180); by the superior court of the city of New York, per SANDFORD, J., in *Oakley agt. Aspinwall* (2 *Sandf.*,

---

Leggett agt. Hyde.

---

7-21); by the present supreme court in repeated decisions, of which see *Catskill Bank* agt. *Gray* (14 *Barb.*, 471); *Hodgeman* agt. *Smith* (13 *id.*, 302); by the court of appeals, PECKHAM, J., in *Manhattan Brass Co.* agt. *Sears* (45 *N. Y.*, 797); per LEONARD, C., *Ontario Bank* agt. *Hennessy* (48 *N. Y.*, 545-552); per GARDINER, J., *Burckle* agt. *Eckhart* (3 *N. Y.*, 132-138).

It is not too much to say the limited partnership act (1 *R. S.*, 764) is a legislative and practical recognition of this rule of commercial law. Indeed, if it shall be held that such a contract as that of the appellant does not make him a partner as to third persons, there is little or no need of that act. The situation of the special partner is more onerous than that of the appellant under such a ruling. The first may lose his capital invested, as well as profits, by the same being absorbed in the payment to creditors. The latter may lose his anticipated compensation for his money loaned, but his position is quite as favorable to him as that occupied by creditors for the recovery of his money advanced. Neither may interfere — to transact business or to sign for the firm, or to bind the same — both may advise as to the management; both may examine into the state and progress of the partnership concerns — the special partner from time to time, the appellant at the end of every six months. In one respect the special partner is better placed. He may stipulate for legal interest on his capital invested, as well as for a portion of the profits. The appellant, if he bargained for profits in addition to interest, might be in conflict with usury act.

It is evident that most of the conveniences and advantages of the limited partnership act, and some which it does not give, might be obtained by a loan of money, with a stipulation for compensation for its use, by a share of the profits, if thereby a partnership is not created as to third persons. This is not decisive as to what the law is. But it is strongly indicative of the view of the law held by the revisers and by the legislature. There have been from time to time



---

Leggett agt. Hyde.

---

certain exceptions established to this rule in a broad statement of it. But the decisions by which these exceptions have been set up still recognize the rule, that where one is interested in profits, as such, he is a partner as to third persons. These exceptions deal with the case of an agent, servant, factor, broker or employe, who, with no interest in the capital or business, is to be remunerated for his services by a compensation from the profits, or by a compensation measured by the profits; or with seamen on whaling or other like voyages, whose reimbursement for their time and labor is to finally depend upon the result of the whole voyage. There are other exceptions, like tenants of land or a ferry, or an inn, who are to share with the owners in results, as a means of compensation for their labor and services. The decisions which establish these exceptions do not profess to abrogate the rule—only to limit it. It is claimed by the learned counsel for the appellant that the rule as announced in *Grace agt. Smith*, and *Waugh agt. Carver*, has been exploded, and another rule propounded which shields the appellant. He is correct as far as the courts in England are concerned (*Cox agt. Hickman*, 8 *H. of E. C.*, 268, 269; *C. B. N. S.*, 99; *E. C. L. R.*, 47; and *Bullen agt. Sharp*, *Law Rep.*, 1 *Com. Pl.*, 86). These cases affirm that, while a participation in the profits is cogent evidence that the trade in which the profits were made was carried on, in part, for or in behalf of the person claiming the right to participate; yet that the true ground of liability is that it has been carried on by persons acting in his behalf. Those cases were very peculiar in their circumstances. After the judgments rendered in them the parliament deemed it needful to enact that the advance of money by way of loan, to a person in trade, for a share of the profits, should not of itself make the lender responsible as a partner (28 and 29 *Victoria*, ch. 86, as cited in *Parsons on Part.*, 92, note t). If the decisions in the cases cited went as far as is claimed, it would seem that the act was supererogatory. It is suggested, however, by KELLY,

---

Leggett agt. Hyde.

---

C. B., in *Holm agt. Hammond* (*Law Rep.*, 7, *Exch.*, 218), that the effect of the statute is, that the sharing in the profits by a lender shall be no evidence at all of a partnership. At all events, those decisions have been accepted in England as settling the rule as above stated (*See case last cited and cases therein referred to*).

Without discussing those decisions, and determining just how far they reach, it is sufficient to say that they are not controlling here; that the rule remains in this state—as it has long been—and that we should be governed by it until here, as in England, the legislature shall see fit to abrogate it.

The references upon the appellants' points do not show that the courts of this state have yet exploded the rule I have stated. I have consulted all the authorities cited (save a few of which I had not the books, or as to which there was a mis-citation), and I do not find that the rule is questioned, further than to apply to the facts of the particular case some one or more of the exceptions to the rule which I have stated to exist.

I am of the opinion that the judgment appealed from should be affirmed, with costs.

All concur, except CHURCH, Ch. J., dissenting.

---

Lathrop agt. Lathrop.

---

N. Y. SUPERIOR COURT.

JOHN P. P. LATHROP agt. JOSHUA LATHROP.

*Use of firm name after dissolution of copartnership—use of the words “& Co.” when there is no partnership.*

Where a copartnership is dissolved and no agreement made between the parties in regard to the good will, nor any restriction from going into the same business, or from using the former firm name, *Held*, that there was no reason why the defendant might not use the name of the old firm, where it properly designated also the name and style of his new firm as long as it existed.

Where the plaintiff sought to restrain, by injunction, the defendant, his former partner, from using the name of the old firm, “J. Lathrop & Co.,” and also from the use of that name and style after the defendant had dissolved partnership with the new firm, and carried on business alone—the use of the words “& Co.” being prohibited by statute:

*Held*, that the plaintiff was not entitled to the injunction to restrain the defendant from using the name of the old firm, before the dissolution of the new firm, and if the defendant had made himself liable to the penalty prescribed by the statute of 1833 by using the words “& Co.” contrary to the statute, he could be proceeded against by an appropriate action under that statute, but it gave no authority for this action.

*Special Term, November, 1873.*

MOTION for an injunction: use of firm name after dissolution of copartnership: use the words “& Co.” where there is no partnership.

VAN VORST, *J.*—On the dissolution of the copartnership existing between plaintiff and defendant, no agreement was made between the parties in regard to the good will. Neither was restricted from going into the same business, or from using the former firm name.



---

Lathrop agt. Lathrop.

---

The plaintiff after the dissolution established himself in business under his own name, and so continued until January 1, 1873, when he entered into partnership with another, under the style of "Lathrop & Engs."

The defendant, after the dissolution, formed a partnership with one Tisdale, and transacted business under the name of "J. Lathrop & Co." This was the style of the old firm. Yet I can see no valid reason why he might not do so. He was not prohibited by any covenant with his late partner from adopting such style.

In England when a dissolution of a partnership takes place and the property is divided, each partner, in the absence of an agreement to the contrary, may continue to use the partnership name (*Banks* agt. *Gilson*, 34 *Beav.*, 568 [*S. C.*], 11 *Jurist* [*N. S.*], 680).

Such rule does not exist to the same extent in this state. A firm name is the style which certain persons have adopted, under which as partners they do business.

Such style cannot survive the existence of the partnership. It certainly could not, under the circumstances, have been used by the plaintiff, as it would indicate the presence of the defendant as connected with the plaintiff's business, which was not the fact. Care, it seems, had been taken on the dissolution of the former firm to address letters to all its customers announcing the dissolution, and as far as defendant was concerned he notified them of the formation of his business connection with Tisdale.

The new firms might each fairly compete for the business of the old firm which had been given up.

It may be that the fact that the name of the defendant was prominent in the style of his new firm, as it was in the former, gave him some advantage. But that can afford no sufficient reason why he should be compelled to abandon its use.

About seven months after the defendant commenced to use the style of "J. Lathrop & Co.," to indicate his new

---

Lathrop agt. Lathrop.

---

firm, plaintiff notified him that he would hold him liable for injury sustained by plaintiff, and benefits received by defendant.

This would seem to be an assertion of a right to damages in an action at law. Plaintiff says that he protested earlier against the use of such firm name by defendant, but this is denied by the defendant.

This is a motion for an injunction order restraining and enjoining the defendant from the further use of the firm name of "J. Lathrop & Co." until the determination of this action. The complaint in the action demanding as relief a perpetual injunction and restraint from the use of such firm name.

I cannot think that such injunction should now issue, and this although the defendant has dissolved his connection with Tisdale, and is actually engaged in business on his own account.

The act of April 29th, 1833, provides that when the designation "& Co." is used it shall represent an actual partner or partners. But it is also provided that any person offending against the provisions of the act shall be punished by a fine not exceeding \$1,000.

The defendant may have made himself liable to such penalty in an appropriate action for such violation, but the act in question gives no authority for this action.

If the plaintiff on the hearing shall, for any reason, show himself entitled to the relief he demands he may then obtain it, but I do not think that the papers on this motion show a case so clear as to justify its issuance at this time.

Motion denied.

---

Butterfield agt. Radde.

---

## N. Y. SUPERIOR COURT.

EDWIN L. BUTTERFIELD agt. WILLIAM RADDE.

*Construction of act of 1874—authorizing appeals to court of appeals under \$500 in amount on condition only.*

An application under chapter 322, of the Laws of 1874, for a certificate or order to authorize an appeal to the court of appeals, may be made by motion to *any general term* of the court; it is not confined exclusively to the same general term in which the decision was rendered.

Under this act, when in the judgment of the court sitting in general term, there is some *question of law* involved which ought to be reviewed in the court of appeals, such general term may allow the appeal to be taken.

The intent of the legislature, in the passage of this act, undoubtedly was to relieve the court of appeals from the great pressure upon its calendar, and the court, at general term, must be satisfied upon these applications that the questions of law involved in the case are of a nature which, in the language of the statute, *ought* to be reviewed by that tribunal; and that they fall within one or other of the following classes:

That they involve the construction of a public statute;

That they involve questions of law of public importance, or as affecting a large public interest;

That a large number of cases are depending upon the determination of the one case; or

That the principles involved are of importance to others than the parties litigating.

And in respect to either of these classes of cases, the court must be satisfied that there is fair and reasonable ground *to doubt the correctness of the decision sought to be reviewed.*

In this case, *held*, that the question desired to be reviewed was of no public or general importance, and there was no doubt of the correctness of the decision of the general term upon it. Motion denied with costs.

*Motion at General Term, heard August 4, 1874.*

*Before MONELL, Ch. J., and SEDGWICK, J.*



---

Butterfield agt. Radde.

---

THIS is a motion made under chapter 322 of the Laws of 1874, for a certificate or order to authorize an appeal to the court of appeals.

The papers used upon the motion state that the action was to enforce the liability of the defendant, as a stockholder of a manufacturing company, organized under the laws of this state, for the debts of the company.

On the trial, there was proof that at the time the indebtedness accrued, the defendant was a "trustee" of the corporation,

Such proof, the court, at the trial and at the general term, held was *presumptive* evidence that the defendant was a stockholder; the act requiring that a trustee should be a stockholder; and the defendant excepted to the decision.

That is the only question which it is claimed should be reviewed by the court of appeals.

The judgment was less than \$500.

*S. D. Seward*, for the motion.

*C. M. Earle*, opposed.

MONELL, *Ch. J.*—The statute under which this motion is made (chapter 322 of the Laws of 1874) declares that no appeal shall hereafter be taken to the court of appeals from any judgment or order granting or refusing a new trial, where the amount of the judgment does not exceed \$500, &c., "*unless the general term of the court from whose decision such appeal shall be taken, shall, by an order to be entered in its minutes, state that there is involved some question of law which ought to be reviewed in the court of appeals.*"

The first objection to this motion is, that the motion should have been made to the *same* general term by or in which the decision was rendered. Such, however, is not a correct construction of the statute. The motion must be to *a* general term of the court, and cannot be made elsewhere; but there is nothing in the statute that requires the same

---

Butterfield agt. Radde.

---

general term in which the decision was rendered, exclusively to entertain the motion. It may do so, and so may any other general term.

The court in *banc*, or in general term, may consist of two or more judges, but a concurrence of at least two judges is necessary to render a decision. A general term is a mere branch of the court; and in this court is changing in its *personnel*, constantly. It would have been impracticable to have required these motions to be made to or at the same term in which the decision was rendered. Frequently, decisions are made after the adjournment of the term, and after the members who constituted it have become occupied in other branches of the court; and it would be difficult to reconstitute the court as it was when the decision was made, so that a motion could be entertained by it.

The judgments the court of appeals is authorized to review are such as are made by the court *at* the general term. But they are the judgments of the *court*, and not of the general term.

Hence, the legislature has provided that the motion shall be made to the general term "*of the court*" from whose decision the appeal shall be taken.

We think the motion is properly before us.

The intention of the statute was, doubtless, to relieve, in some measure, the court of last resort of its overburdened and fast accumulating calendar of causes. Heretofore, there has been no restriction to appeals from judgments of courts of record. All alike were subject to review; and there could be no discrimination between such as involved difficult or important principles of law and such as merely involved small and insignificant sums of money. But as the parties to a controversy do not litigate to establish or settle principles of law, but merely to get or to prevent the getting of money, it was well to put a limit to appeals, and to fix the limit by the sum of money involved.

In thus fixing the limit at \$500 the legislature was

---

Butterfield agt. Radde.

---

careful to retain the power of ultimate review in cases where it would be proper, without regard to the amount. So that, when in the judgment of the court sitting in general term, there is some *question of law* involved which ought to be reviewed in the court of appeals, such general term may allow the appeal to be taken.

In making this exception the legislature has conferred a discretionary power upon the general terms which should be wisely and discreetly exercised; and especially with reference to the accomplishment of the objects of the statute, and not to defeat its ends.

The most usual objects to be attained by litigation, is the enforcement and protection of rights, or the prevention or redress of wrongs; and no just discrimination can be made which shall wholly exclude a party, in any case, from seeking in the courts such protection or redress. But the legislature has always assumed the right to limit and restrict jurisdictions and to confine litigants to tribunals, having reference to the amount in controversy alone. Hence, inferior courts not of record, have been established, with jurisdiction limited to a small sum of money, and their judgments made final except in exceptionable cases.

To have the law settled is perhaps of more importance than to have it settled correctly. Conflict of decisions and want of harmony in the views of different tribunals, renders the law unstable, and necessarily leads to and increases litigation. But so long as the end is accomplished, it is not of much importance how it is done, nor whether the *ultima thule* is the court of appeals, the supreme or superior court, or even a court of a justice of the peace.

Few questions of law can be said to arise in any case, which have not an analogy to be found in the books; and their determination by any tribunal of sufficient learning, if made a final determination, would as effectually, and probably as satisfactorily, settle the law as if it was carried by successive stages to the highest tribunal.



---

Butterfield agt. Radde.

---

To give such effect to the statute as we must assume was intended by the legislature, which was to relieve the court of appeals from the great pressure upon its calendar, we must be satisfied upon these applications, that the questions of law involved in the case, are of a nature which, in the language of the statute, "*ought* to be reviewed" by that tribunal; and that they fall within one or the other of the following classes:

That they involve the construction of a public statute;

That they involve questions of law of public importance, or as affecting a large public interest;

That a large number of cases are depending upon the determination of the one case, or

That the principles involved are of importance to others than the parties litigating;

And, in respect to either of these classes of cases, the court must be satisfied that there is fair and reasonable ground to *doubt the correctness of the decision sought to be reviewed.*

But if the decision concerns the parties to the action only, and is of no general or public importance, the judgment of the general term should be final.

There is much room for difference as to what cases fall within the classes indicated; but that is unavoidable. The courts will best subserve the interests of the public in very sparingly granting permission to continue litigations beyond the general term, and to grant it only in cases of both great importance and doubt.

In the case before us, the question which it is desired to obtain a review of, is of no public or general importance, nor do we entertain any doubt of the correctness of the decision of the general term upon it; and the defendant must be concluded by such decision.

The motion must be denied, with costs.



# D I G E S T

CONTAINING THE WHOLE OF

47 HOW., ANTE, AND QUESTIONS OF PRACTICE CONTAINED IN  
1 AND 2 SUPREME COURT REPORTS; 1 HUN  
AND 52 AND 53 N. Y. REPORTS.

## A.

### ABATEMENT AND REVIVAL.

1. The right of the representatives of a deceased party to continue an action pending at the time of his death is not absolute, but rests in the legal discretion of the court to which application is made under section 121 of the Code for leave to continue. (*Beach* agt. *Reynolds*, 53 N. Y. R., 1.)
2. In such cases the equitable rule which requires reasonable diligence as well as good faith prevails, and a long delay in making the application constitutes *laches* and a valid reason for denying the application. (*Id.*)
3. Proceedings to revive and continue actions are within the purview of the statute of limitations, and are barred by lapse of time. (*Id.*)
4. Whether an order denying an application to revive and continue an action is appealable to this court, *quere.* (*Id.*)

### ACCORD AND SATISFACTION.

1. It has long been settled that a plea of the payment of a less sum than is admitted to be due, cannot

be held good as an accord and satisfaction. (*Williams* agt. *Irving*, ante, 440.)

2. And the payment of a lesser sum than is admitted to be due does not preclude a recovery of the balance, though the payment is evidenced by a receipt expressing payment to be made in full of all demands. (*Id.*)
3. But, if there has been a *bona fide* dispute between the parties as to their rights, and they agree upon a sum to be paid, and the same is paid, this will bind the parties; not, however, upon the principle of accord and satisfaction, but upon the principle that the parties have ascertained their rights and effected a settlement upon the basis of such rights. (*Id.*)

### ACKNOWLEDGMENT.

1. The acknowledgment of a deed was this: "Personally appeared before me, Robert S. Livingston, signer and sealer of the foregoing instrument, and acknowledged the same to be his free act and deed before me." *Held*, insufficient. (*Miller* agt. *Link*, 2 S. C. R., 86.)
2. The acknowledgment of a deed must show, that the party acknowledging the instrument was known,



## Digest.

or proved, to the officer to be the party named in, and who had executed the same. (*Id.*)

## ACTION.

1. The mere pendency of a former action is not a legal bar to an action, even if between the same parties. (*Ritter* agt. *Worth*, 1 S. C. R., 406.)
2. A demand is not necessary before bringing action against a sheriff for moneys collected by him upon execution, and which he retains in his hands. The Code has not changed the rule in this respect. (*Nelson* agt. *Kerr*, 2 S. C. R., 299.)
3. The provision of section 291 of the Code, that "existing provisions of law not in conflict," &c., "shall apply to executions," &c., refers to the law as established by the courts, as well as that established by the legislature. (*Id.*)
4. An order giving plaintiff leave to bring an action against defendant upon a judgment for a deficiency upon a foreclosure sale and for the amount of deficiency appearing by the referee's report in an action between the same parties, *held*, not an appealable order. (*Hanover Fire Ins. Co.* agt. *Tomlinson*, 2 S. C. R., 657.)
5. H. brought action against G. and others, to have set aside as fraudulent the conveyance of certain real estate to G. The complaint was dismissed as to G., with costs against H. Afterward G. sold the real estate to D., and H. assigned his claim to plaintiff, who brought action upon the same subject-matter as the former suit against D., G. and others. *Held*, that the defendants D. and G. were entitled to have the proceedings in this action stayed as to both, until the costs of the former action were paid. (*Hill* agt. *Grant*, 2 S. C. R., 467.)
6. An action brought by an administrator upon a judgment recovered by his intestate, is not "between the same parties," within the meaning of section 71 of the Code, requiring leave of the court to sue. (*Smith* agt. *Britton*, 2 S. C. R., 498.)
7. Plaintiff, who owned a lot of land, conveyed a part thereof to M. H. Afterward, he sold and conveyed to defendant, by deed, the lot, excepting the part conveyed to M. H., stated to be about four acres. When negotiating the sale, plaintiff informed defendant that a certain fence was the line between him and M. H., and defendant took possession of the land up to the fence. Subsequently, plaintiff acquired title to the land conveyed to M. H., and it was discovered that by a mistake of the surveyor the deed to M. H. embraced upward of ten acres, and that the fence was not upon the line according to that deed. In an action of ejectment brought by plaintiff to recover the land embraced in the deed to M. H., *held*, that defendant had a right to maintain an equitable action against plaintiff to have the deed to him (defendant) reformed, and could set up this equitable right as a defense to an action at law without claiming affirmative relief. (*Hoppough* agt. *Struble*, 2 S. C. R., 664.)
8. This action was brought to restrain defendant from continuing proceedings commenced by him to recover possession of certain premises occupied by the plaintiffs. The plaintiffs obtained an injunction, giving an undertaking in the sum of \$5,000. The injunction was subsequently dissolved, and defendant's demurrer to the complaint sustained, and judgment given for costs. Defendant having died, his executor made a motion to revive the action, in order to have a reference to compute the damages under the injunction.

## Digest.

The motion was denied, and, upon appeal, this order was affirmed, the court holding that the appellant's representatives could obtain all their rights by bringing an action upon the undertaking. (*Grisler* agt. *Stuyvesant*, 1 *Hun*, 116.)

9. In an action in a court of equity, brought by one of a class of persons, on behalf of himself and all others similarly situated, the rule is, that all persons composing the class, may come in under the decree and prove their rights and obtain satisfaction equally with the plaintiff, being thereafter in all respects treated as parties to the suit. (*Prouty* agt. *Mich. So. & N. Ind. R. R. Co.*, 1 *Hun*, 655.)

10. An objection that stockholders should have been made parties to a suit, held untenable under the decision in *Thompson* agt. *Erie R. R. Co.* (45 *N. Y.*, 468). (*Id.*)

11. The question as to who is a proper party defendant, in an action brought on an obligation of one of several consolidated corporations, after their consolidation, discussed. (*Id.*)

12. Proceedings in the nature of a *quo warranto* under chapter 2 of title 13 of the Code are a civil action, and the prevailing party is entitled to costs. (*People ex rel.* agt. *Olute*, 52 *N. Y. R.*, 576.)

## ADMISSION.

1. An admission of service of notice of the entry of a judgment, although *prima facie* correct as to its date, is by no means conclusive. The presumption arising from it may be overcome by better evidence, showing that the service was actually made one day later than the date of the admission. (*Rogers* agt. *Schmersahl*, 2 *S. C. R.*, 668.)

## AGREEMENT.

1. Where a special agreement was made between the defendant and the firm for repairing two card-cutters and grinding and putting a third in order, and the work appeared to have been performed and the card-cutters returned to and retained by the defendant, but the material used in repairing and completing the two was either not good or improperly tempered, and for that reason the defendant resisted the plaintiff's demand for the price agreed to be paid for the work and material used. (*Krom* agt. *Levy*, *ante*, 97.)
2. Held, that this he could not do after receiving and retaining what had been done. It was such a performance as entitled the plaintiff to recover the price agreed to be paid, subject to the defendant's right to reduce it by way of recoupment or counter-claim on account of the defective manner in which the work was done. But this defense was not set forth in the defendant's answer, and for that reason it could not have been properly allowed by the referee, even though it appeared in his evidence given on the trial. (*Id.*)

See SPECIFIC PERFORMANCE.

*Reede* agt. *Schneider*, *ante*, 379.

3. Plaintiff, being the owner of a farm, in March or April, 1870, entered into an agreement with one C. to cultivate a certain portion of it on shares, plaintiff to retain the absolute title and possession of C.'s share of the crops raised, as security for certain advances made by the plaintiff. (*Hadley* agt. *Barton*, *ante*, 481.)
4. On the 10th of June, 1870, after the crops had been sown and planted by C.—the plaintiff, in the meantime, having advanced to C. money to pay for seed, &c., in the whole to the sum of \$280—

## " Digest.

the plaintiff sold the farm, by an executory contract, to one G., and delivered to G. the immediate possession, without any reservation or notice of C.'s interest therein. (*Id.*)

5. C., having gone on, subsequent to the sale, and harvested and gathered the crops, sold his share (amounting to about \$280) to the defendant. The plaintiff claimed that C. had no title to convey; that never having paid back to plaintiff the advances made to C., the title and possession of C.'s share was in the plaintiff, and therefore brought this action for conversion. (*Id.*)

6. *Held*, that by the contract with G., the purchaser, without reservation, the plaintiff transferred to G. the immediate right of possession, and all the right to the crops then growing or thereafter to be planted and grown and harvested; and thereby disengaged himself from performing any agreement with C. for cropping on their joint account, and necessarily abandoned that agreement, and was estopped from setting up any claim to the crops thereafter to be cultivated and harvested on the farm as against his vendee, G. The plaintiff had clothed G. with the apparent and also with the real title. The action could not be sustained. (*Id.*)

## ALIMONY.

1. *Quere.* Does the marriage contract give the wife any right to contest a transfer by her husband, after marriage, made by him with intent to defraud her of her support, and to prevent her from recovering alimony? By EARL, Com. (*Terry* agt. *Wait*, ante, 52.)
2. Where, upon a divorce obtained by the wife, on the ground of the husband's adultery, the decree re-

quires him to pay her a certain sum of money, annually, for her support, this allowance is not affected by her subsequent remarriage, nor should it be reduced on that account. (*Shepherd* agt. *Shepherd*, 1 *Hun*, 240.)

## ANSWER.

1. Defendant demurred to the complaint, and the demurrer being overruled did not appeal, but answered setting up the same ground argued in the demurrer. *Held*, that the decision of the demurrer did not preclude him from doing so, or estop the court from again considering the question. (*Smith* agt. *Britton*, 2 *S. C. R.*, 498.)
2. Where an answer in an action for fraud, contains a denial of the fraud, and a statement of facts which tend to prove the absence of an intent to defraud, a demurrer to it should be overruled, even though the pleading is wholly defective, and ought on motion to be stricken out. (*Van Alstyne* agt. *Norton*, 1 *Hun*, 537.)

## APPEAL.

1. Where an appeal from a judgment rendered by a single judge of the marine court to the general term is taken by the defendant upon an undertaking staying proceedings under sections 334 and 335 of the Code, and the appeal, through the defects or laches of the defendant in serving the printed case and exceptions, is dismissed by the general term, it is an effectual dismissal within the terms of the undertaking, and the sureties become liable; although it does not operate as a bar to another appeal, if the time limited therefor has not elapsed. (*Wheeler* agt. *McCabe*, ante, 283.)



## Digest.

2. Ten days' notice before suit brought upon the undertaking, required by section 348 of the Code, of "the entry of the order or judgment affirming the judgment appealed from," does not apply to such a case, as the judgment was not affirmed, but the appeal was simply dismissed. (*Id.*)
3. A judgment of reversal by the court of appeals of a judgment of the general term of the court below, reversing a special term judgment appealed from, does not satisfy and discharge the obligations of the sureties on the undertaking given on the appeal from the special to the general term. (*Richardson agt. Kropf, ante, 286.*)
4. This court will not entertain an appeal from an order of the general term, affirming an order of the special term setting aside a judgment entered on the report of a referee, for his alleged misconduct, and granting a new trial. (*Livermore agt. Bainbridge, ante, 354.*)
5. The appeal will be dismissed on the ground that the motion was one addressed to the discretion of the judge at special term, and that no appeal in such a case lies to this court from the order of the general term, reviewing the exercise of that discretion. (*Id.*)
6. If the judge in the first instance decides wrongly, the general term can correct him. But there the right of review ends. This court possesses prescribed and limited powers, and its jurisdiction does not extend to review orders resting in discretion. (*Id.*)
7. On an appeal from a justice's court, upon questions of law only, the appellant cannot insist upon any error not specified in the notice of appeal. (*Slingerland agt. Bronk, ante, 408.*)
8. The appellant in this case having failed in his notice of appeal to specify the evidence claimed to be improper, illegal and irrelevant, or to specify in what particular the judgment is against the law and evidence in the case, the judgment of the court below (which was taken by default) for these reasons affirmed. (*Id.*)
9. An application under chapter 322, of the Laws of 1874, for a certificate or order to authorize an appeal to the court of appeals, may be made by motion to any general term of the court; it is not confined exclusively to the same general term in which the decision was rendered. (*Butterfield agt. Radde, ante, 535.*)
10. Under this act, when in the judgment of the court sitting in general term, there is some question of law involved which ought to be reviewed in the court of appeals, such general term may allow the appeal to be taken (*Id.*)
11. The intent of the legislature, in the passage of this act, undoubtedly was to relieve the court of appeals from the great pressure upon its calendar, and the court, at general term, must be satisfied upon these applications that the questions of law involved in the case are of a nature which, in the language of the statute, ought to be reviewed by that tribunal; and that they fall within one or other of the following classes: (*Id.*)
12. That they involve the construction of a public statute; (*Id.*)
13. That they involve questions of law of public importance, or as affecting a large public interest; (*Id.*)
14. That a large number of cases are depending upon the determination of the one case; or (*Id.*)
15. That the principles involved are of importance to others than the parties litigating. (*Id.*)

## Digest.

16. And in respect to either of these classes of cases, the court must be satisfied that there is fair and reasonable ground to doubt the correctness of the decision sought to be reviewed. (*Id.*)
17. In this case, *held*, that the question desired to be reviewed was of no public or general importance, and there was no doubt of the correctness of the decision of the general term upon it. Motion denied with costs. (*Id.*)
18. In an action before a justice of the peace, defendant put in a general denial, but offered no evidence at the trial. In his notice of appeal, upon the law only, from a judgment in favor of the plaintiff, he specified as grounds of appeal: 1. That the judgment is against law and evidence. 2. That there was not sufficient evidence to support the judgment. 3. That the judgment should have been in favor of the defendant and against the plaintiff, for costs. *Held*, that the specifications were insufficient, and that the judgment should be affirmed, notwithstanding there may have been technical errors committed at the trial. (*Nolan* agt. *Paige*, 1 S. C. R., *Addenda*, 2.)
19. In equity actions the court will always look at the entire case, and see whether substantial justice has been done, and where that appears, it will affirm the judgment, notwithstanding the admission of testimony which, in ordinary actions at law, might have necessitated a new trial. (*Platt* agt. *Platt*, 2 S. C. R., 25.)
20. Defendant appealed from a judgment entered in the county court upon the verdict of a jury, without moving for a new trial in that court. *Held*, irregular and the appeal dismissed. (*Dahash* agt. *Flanders*, 2 S. C. R., 445.)
21. Upon appeal from a judgment in a county court, it did not appear from the appeal papers that the case had been presented to the county court, or that any motion or order had been made thereon in that court. *Held*, that the general term could not review the judgment, and the appeal must be dismissed. (*Lester* agt. *R. W. & O. Railroad Co.*, 2 S. C. R., 672.)
22. A motion for leave to amend appeal papers after argument and decision at general term, on the ground that the correction of a mistake therein, would show that a point decided against the applicant, had been waived, will be denied when it appears that the point was argued, and the applicant supposed it not well taken, and, on the decision, finding himself mistaken, made the application for the correction. (*People* agt. *Board of Apportionment*, 1 *Hun*, 123.)
23. The special term ordered that the defendant's answer be made more definite. After the expiration of the time to amend, the plaintiff moved, on notice, to strike out the answer, and for judgment. The defendant did not appear, and the motion was granted by default, and judgment entered for plaintiff. From this judgment defendant appealed. *Held*, that the order striking out the answers, having been granted by default, is not reviewable on appeal, and that under such circumstances, the court would not regard the answer as reinstated, for the purpose of reviewing the order to make the answer more specific. (*Innes* agt. *Purcell*, 1 *Hun*, 318.)
24. Upon appeal in an action tried by a referee, where the case does not show a request for the referee to find any facts in addition to those stated in his report, this court will not look into the evidence to ascertain whether facts were proved which, if found, would have defeated or limited the recovery,

## Digest.

(*Fabbri* agt. *Kalbfeisch*, 52 *N. Y. R.*, 28.)

25. Plaintiff obtained judgment upon the ground of the frivolousness of the answer. Upon appeal to the general term the judgment was reversed, with costs, with leave to plaintiff to demur, reply or proceed to trial. Defendant entered judgment for costs. Upon appeal to this court, *held*, that the judgment was irregular and unauthorized, and would have been set aside on motion, as the litigation was not terminated and the proceedings were interlocutory; that the appeal was therefore simply from an order in substance refusing to give judgment on the answer; that whether the sufficiency of the answer should be determined upon motion or upon formal demurrer was a matter of practice addressed to the discretion of the court and not affecting a substantial right, and that the order was not appealable. (*Wilkin* agt. *Raplee*, 52 *N. Y. R.*, 248.)
26. An order denying a motion for leave to issue execution, where the facts upon which the motion is made are disputed, is within the discretion of the court, and is not appealable. (*Shuman* agt. *Strauss*, 52 *N. Y. R.*, 404.)
27. The proper remedy for the judgment creditor in such case is to apply to the court, under section 71 of the Code, upon affidavits disclosing the questions to be litigated, for leave to bring an action upon his judgment. (*Id.*)
28. The policy of the Code is to limit the review of facts to the special and general terms and to restrict the jurisdiction of this court to questions of law. The only exception is where the general term reverses a judgment rendered upon trial by the court or a referee upon the facts, and it is so certified in the order of reversal. (*Vermilyea* agt. *Palmer*, 52 *N. Y. R.*, 471.)
29. Where an order for trial by jury of specific questions of fact in an equity action, as authorized by section 72 of the Code, is made, the findings have no greater force or effect than the findings in the old procedure by feigned issue, for which this is a substitute. The findings of the jury are ancillary to the judgment of the court, and the trial of the issue is by the latter. It may set aside the verdict and order a new trial, or find the facts itself, or it may qualify or alter the findings. If approved they become by adoption the findings of the court. (*Id.*)
30. The introduction of this procedure does not, therefore, withdraw the case in other respects from the application of the other provisions of the Code, and the mode of review is the same as in other actions tried by the court. (*Id.*)
31. *It seems*, however, that in reviewing in this court, upon appeal from the judgment, questions of law raised upon the trial by the jury, the old chancery rule is applicable, *i. e.*, that the court will not regard exceptions which do not affect the merits. So if the jury be misled by an erroneous charge of the court upon the law, the error, if vital or important, may be available in this court without an exception. (*CHURCH, Ch. J.*) (*Id.*)
32. An order of general term, affirming an order of special term refusing to punish a party for an alleged violation of an order of the court, made in the progress of an action, does not affect a substantial right, unless the other party had a legal right to demand the relief granted by the order alleged to have been violated, and it is not appealable to this court. (*Carrington* agt. *F. R. Co.*, 52 *N. Y. R.*, 583.)
33. If the facts appearing upon a motion for a reference will warrant a finding that the action involves the examination of a long account,



## Digest.

- and the court below decides to refer, this court will not review such finding. It is only where no such account can be involved that an appeal will lie to this court. (*Welsh* agt. *Darragh*, 52 N. Y. R., 590.)
34. An order of general term, affirming an order of special term denying a motion to strike out an unverified answer to a verified complaint, is appealable to this court. (*Fredericks* agt. *Taylor*, 52 N. Y. R., 596)
35. Questions on cross-examination upon irrelevant subjects are in the sound discretion of the court, and the exercise of this discretion is not subject to review save in cases of plain abuse and injustice. (*Lester* agt. *Field*, 52 N. Y. R., 621.)
36. It is not within the power of an appellate court to dispose of a defense adversely to defendant, on the ground that it is inconsistent with other defenses set up in the answer, where the objection has not before been entertained by the court, the proceedings of which are in review. (*Jackson* agt. *Van Slyke*, 52 N. Y. R., 645.)
37. A judgment of the general term of the supreme court, affirming a decision of a county judge, deciding that a plank-road company is liable to taxation under the act in relation to plank and turnpike roads (*Laws of 1854, chap. 87*), is not reviewable in this court. (*People ex rel.* agt. *Freeman*, 52 N. Y. R., 656.)
38. Whether an order denying an application to revive, and continue an action is appealable to this court, *quere*. (*Beach* agt. *Reynolds*, 53 N. Y. R., 1.)
39. Upon appeal to this court from an order of the general term granting a new trial, the respondent is not confined to the grounds upon which the decision below was based, but may show other grounds for sustaining it. (*Simar* agt. *Canaday*, 53 N. Y. R., 298.)
40. An order though affecting a substantial right cannot be reviewed in this court if it is a matter resting in the discretion of the court granting the order. The reason for not entertaining such an appeal rests not upon the restrictions of the Code, but upon the character of the court and its limited jurisdiction, confining it to the review of questions of law only, except where specially authorized. (*GROVER, J., dissenting.*) (*Howell* agt. *Mills*, 53 N. Y. R., 322.)
41. An order denying a motion to send back a cause tried by a referee to him for further findings will not be reviewed in this court save upon appeal from the judgment. (*Quincey* agt. *Young*, 53 N. Y. R., 504.)
42. Such an order is an intermediate order, involving the merits and necessarily affecting the judgment of the general term, and in case of judgment of affirmance the order is reviewable here on appeal from such judgment. (*Code*, § 11, sub. 1.) (*Id.*)
43. *It seems* that if upon appeal from judgment of affirmance this court should determine that the questions upon which the court below refused to require the referee to pass were material, that there was evidence upon which he might have found upon them in favor of appellant, and that such findings would have entitled him at general term to a reversal of the judgment entered upon the report, the judgment of affirmance will be reversed, with directions that the general term send back the case to the referee for the necessary findings. (*Id.*)
44. All stipulations and agreements made between parties in the progress of an action in the supreme court, and affecting proceedings

## Digest.

in it, and all orders entered thereon, are within the control of the court, and may be set aside in the discretion of the court whenever the parties can be restored to the same condition in which they would have been if no agreement had been made. An order, therefore, granting such relief is not reviewable in this court. (*Barry* agt. *The Mutual Life Insurance Company*, 53 N. Y. R., 536.)

45. It is within the discretion of the supreme court to grant or withhold a common-law certiorari, and its decision cannot be reviewed in this court. (*People ex rel. agt. Hill*, 53 N. Y. R., 547.)

46. An objection to the evidence of a witness, examined *de bene esse*, taken upon the examination, where it is not renewed and no objection is made upon the trial, is not available upon appeal. (*Martin* agt. *Silliman*, 53 N. Y. R., 615.)

47. The provisions of the Code, in reference to appeals, do not affect appeals from surrogate's court. (*Code*, § 471.) They are still governed by the provisions of the Revised Statutes, save as affected by the changes in the organization of the judiciary made by subsequent constitutional amendments, and by the provisions of the judiciary acts (*chap. 381, Laws of 1847*; *chap. 203, Laws of 1871*), consequent thereon; and upon appeal from a judgment affirming the decree of a surrogate admitting a will to probate this court may review questions of fact. (*Howland* agt. *Taylor*, 53 N. Y. R., 627.)

48. A motion to set aside the report of a referee, on the ground of improper conduct on his part, is addressed to the discretion of the court. The action of the special term may be reviewed by the general term, but the right of appeal there ends. (*Gray* agt. *Fisk*, 53 N. Y. R., 630.)

49. Where, under section 261 of the Code, the court instructs a jury to find upon particular questions of fact, the questions to be submitted, and their form are matters within the discretion of the court, and a refusal to submit other or different questions, is not a ground for appeal. (*Hackford* agt. *N. Y. C. & H. R. R. R. Co.*, 53 N. Y. R., 654.)

## APPEARANCE.

1. Brown, Hall & Vanderpoel being authorized to appear for the defendant in all actions regularly commenced against him and none other, appeared as attorneys for him in a case, believing at the time they did so, that the summons had been personally served upon him, while in fact it had not; the defendant did not know of an appearance until after the service of the complaint; on the application of the defendant, an order was made permitting him to withdraw the notice of appearance; *held*, that this was proper. (*Hunt* agt. *Brennan*, 1 *Hun*, 213.)

## ARBITRATION.

1. After the commencement of an action, an agreement, under seal, was entered into by all the parties thereto, to "submit all matters involved in said action, and presented by the pleadings therein, to the hearing, determination and decision of three arbitrators," and "that the action in the supreme court aforesaid, and all proceedings therein, or in relation thereto, shall be stayed pending the award of said arbitrators;" *held*, that the submission would have effected a discontinuance of the action but for the clause providing for a stay of proceedings; that this operated as a perpetual stay until the making of the award which would at once effect a final discontinuance.

## Digest.

of the action. (*Jacoby* agt. *Johnston*, 1 *Hun*, 242.)

## ARREST.

See DEBTOR AND CREDITOR.

*Adrience* agt. *Lagrange*, ante, 71.

1. A person who has been surrendered by a foreign government, under an extradition treaty, for the commission of a crime here, coming within the treaty stipulation, has a clear and absolute right to return to the country from which he was taken, after the purposes of justice have been satisfied as to the particular offense for which he was surrendered. (*Bacharach* agt. *Lagrange*, ante, 385.)
2. No other principle than that securing immunity from arrest for causes not provided for by the treaty, can either fairly or reasonably be deduced from the purposes and provisions of the constitution and laws of the United States relating to the removal of offenders from one state to another. (*Id.*)
3. A defendant may move for his discharge from arrest, even after judgment, if within twenty days after the service of the order of arrest. (*Farmer* agt. *Robbins*, ante, 415.)
4. Where the defendant, residing in a foreign country, was attending as a witness, duly subpoenaed, before the referee on the trial of a cause, and after the reference was closed, and defendant about leaving for his home, he was arrested in an action, and failing to claim his personal privilege to the sheriff, and failing to demand from the county judge (who issued the order), as he had a right, to his personal privilege, but, on the contrary, acquiesced in the arrest by his silence in respect to his personal privilege, and, in addition to that, entered into the usual undertaking, and then awaited some twenty-two days be-

fore serving the motion papers for an order discharging the arrest. (*Id.*)

5. *Held*, that the defendant must be held to have waived his "personal privilege" and acquiesced in the arrest. He had not been free from laches in his efforts to get rid of an arrest to which he had a valid objection, had it been taken in time. (*Id.*)
6. It is a sufficient arrest when one, being informed by an officer that he has a warrant for him, submits to such officer's control. (*Van Voorhees* agt. *Leonard*, 1 *S. C. R.*, 148.)
7. To constitute an arrest which is unlawful is sufficient to maintain an action for false imprisonment, an actual manual touching of the body is not required, but only whatever is equivalent amounting to a restraint of liberty of the person. (*Searles* agt. *Viets*, 2 *S. C. R.*, 224.)
8. In an action for false imprisonment it appeared that R., a constable, having a warrant for plaintiff and his sons, issued by a justice, met the plaintiff and one of his sons in a wagon. R. said: "I have a warrant for you and your two sons." Plaintiff asked for what. R. replied, "for stealing pumpkins." Plaintiff started to get out of the wagon, and R. said: "You can go home and get your horses put up and take your tea and come down." Plaintiff went home, took his tea, employed a lawyer, and with him and his two sons went to R.'s, and calling out R., said, "Here's your prisoners." R. said "You move on and I will overtake you." They went on, and R. overtook them as they got to the house of the justice. The matter was then, after discussion, adjourned to another day, without bail, and on the adjourned day the plaintiff appeared, an examination was had, and the justice



## Digest.

dismissed the case. *Held*, that the evidence showed an arrest of the plaintiff. (*Id.*)

9. The complaint alleged: "That at various dates between September 17, 1870, and March 20, 1873, the plaintiff deposited with the defendants, as its bankers, various sums of money, which said deposits, on the said 20th day of March, 1873, after deducting all credits due to said defendants, amounted in the aggregate to the sum of \$29,500, leaving the defendants, on said last mentioned day, indebted to the plaintiff in the aforesaid sum and interest." That the plaintiff had, since the said sum became due, demanded payment thereof from the defendants, who refused to pay the same, and that no part thereof had been paid. *Held*, That these allegations showed only a cause of action arising upon contract, and that there was no averment from which it would be justly inferred that the indebtedness sued for was for money received in "a fiduciary capacity," within the meaning of the Code. (*Buchanan Farm Oil Co. agt. Woodman*, 1 Hun, 639.)
10. The affidavits used by the plaintiff on a motion for an order of arrest, contained allegations tending to show a fraudulent conspiracy between Rose, the plaintiff's treasurer, and defendants, to get into the possession of defendants the money of plaintiff, so that Rose could use the same by defendants' aid and connivance, in his individual stock speculations. *Held*, that an action to recover for such fraudulent acts, could only be maintained upon a complaint charging the alleged fraud and conspiracy; that such a cause of action was inconsistent with the cause set forth in the complaint, and that an order of arrest in this action could not be sustained. (*Id.*)
11. Plaintiff brought action upon defendants' acceptance of a draft drawn upon them by A. K. & Co. Plaintiff obtained an order of arrest upon affidavits showing that the drawers of the draft, as common carriers, had shipped grain by canal to New York, upon which they had a lien for freight and toll advanced; that they consigned the grain to defendants to collect the lien and to deliver upon payment; that bills of lading were made out for the amount of the lien, the draft drawn for amount thereof, which was discounted by plaintiff, upon receipt of the bills of lading, indorsed to it as security; that plaintiff forwarded the draft to defendants for acceptance, also the bills of lading, with instructions to collect and apply in payment of the draft; and that defendants accepted the draft, collected the bills, mingled the moneys with their own funds, and then failed. *Held*, that the action being founded upon the liability incurred by the acceptance, not for the moneys collected, no facts were stated warranting an order of arrest, and that therefore it was properly set aside. (*F. & M. Nat. Bank agt. Sprague*, 52 N. Y. R., 605.)
12. A complaint, alleging that defendant, as an assignee for the benefit of creditors, had received a sum of money, of which by the terms of the assignment plaintiff was entitled to a share, and which defendant, although requested, has refused and neglected to pay over, sets forth a cause of action authorizing an arrest of the defendant, as specified in section 179 of the Code, *i. e.*, for money received by a person in a fiduciary capacity, and upon a judgment in such action an execution against the person of the judgment debtor may be issued. (*Code*, § 288.) (*Roberts agt. Prosser*, 53 N. Y. R., 260.)
13. The fact that the denials in the answer in such an action render it necessary to take an account for the purpose of ascertaining the amount to which plaintiff is entitled does not change the character

## Digest.

of the action or afford an excuse for the non-payment of the money when ascertained. (*Id.*)

14. Where a complaint sets forth two causes of action, upon one of which only defendant is liable to arrest, an order of arrest cannot be granted. (*Bowen agt. True, 53 N. Y. R., 640.*)

## ARREST AND BAIL.

1. Plaintiff's clerk obtained a warrant against defendant in Philadelphia, upon the charge that he was a fugitive from justice. Defendant, to avoid "a requisition from Albany" and publicity, consented to come with the clerk to New York. Upon his arrival in New York, defendant was arrested in a civil action. There was no indictment or criminal charge against defendant, and the warrant in Philadelphia was obtained unjustifiably. *Held*, that the arrest here was void. (*Smith agt. Meyers, 1 S. C. R., 665.*)
2. The employment of any subterfuge, scheme, enterprise, pretense or design, by which a defendant is brought into this state, for the purpose of arresting him, must fail, unless it is warranted by the law of the land, and the question does not depend upon the honest convictions of the persons engaged in the project, but upon the legality of the act. (*Id.*)
3. An order was granted, upon affidavits showing that credit for goods was given to the defendant upon representations as to his financial condition, and that his property was unincumbered; which representations were untrue. *Held*, that the order was properly granted. (*Whitmore agt. Van Steenberg, 2 S. C. R., 668.*)
4. The defendant moved to vacate the order of arrest, upon affidavits

denying the making of the representations, and setting up a special partnership agreement between himself and the plaintiff, the existence of which was denied by the latter, and his denial was corroborated by three witnesses. The defendant failed to establish the making of the agreement, or a course of dealing under it. *Held*, that under these circumstances a motion to vacate the order of arrest should be denied. (*Id.*)

## ASSIGNMENT.

1. The statute of 1860 (*chap. 348*), in relation to assignments for the benefit of creditors, is not an insolvent law, and is not interfered with by the bankrupt law. (*Thrasher agt. Bentley, 2 S. C. R., 309.*)
2. The collection of assigned choses in action, by the assignee, is not a conversion of them within the meaning of section 3 of the act of 1860. (*Id.*)

## ATTACHMENT.

1. Where an attachment was granted against the property of the defendant, as a non-resident, at the time of issuing the summons, and no order of publication was obtained within thirty days thereafter, and the defendant was not personally served with the summons during said period, *held*, that the attachment was thereby invalidated, and should be set aside. (*Taddiken agt. Cantrell, 1 Hun, 710.*)
2. The power to levy by virtue of an attachment does not survive the recovery of judgment in the action, and no new right or interest in the property of the defendant can be thereafter acquired under it. (*Lynch agt. Crary, 52 N. Y. R., 181.*)

## Digest.

3. One who applies to a judge to issue an attachment for the arrest of another, and who receives and delivers it to a sheriff for service, is liable for the arrest in case the attachment is void for want of jurisdiction in the judge or for any other cause. (*Miller agt. Adams*, 52 N. Y. R., 409.)
4. In order to authorize the issuing of an attachment in proceedings supplementary to execution, instituted under section 294 of the Code, against one indebted to the judgment debtor, because of his neglect to appear and be examined, as required by an order of the county judge, no proof by affidavit of such failure to appear is required; the judge has judicial knowledge of the fact. (*Id.*)
5. Where the application for such order to appear is made upon the affidavit of an attorney, it is not necessary that the attorney make proof of his authority to act, in order to confer jurisdiction upon the judge to issue the order. (*Id.*)
6. An affidavit that the person whose examination is desired has property of the judgment debtor in his hands or is indebted to him, as the deponent is advised and believes, is sufficient to confer jurisdiction upon the judge to grant the order. (*Id.*)
7. *It seems* that such an affidavit meets all the requirements of said section, and would be held sufficient to sustain the order upon a direct application to set it aside. (*GROVER, J.*) (*Id.*)
8. An attachment is a proper remedy against an attorney who retains money and refuses to pay it over that justly belongs to his client, and good faith in withholding the money is no ground for exemption from such remedy. (*B. G. Savings Bank agt. Todd*, 52 N. Y. R., 489.)
9. The remedy by attachment, given by section 321 of the Code against an assignee *pendente lite* to enforce the payment of costs for which he is made liable by that section, was intended only to apply as against assignees taking and holding in their own right. If such assignee holds in a representative capacity, specified in section 317, in the absence of misconduct or bad faith, he is protected from personal liability by that section, and section 321 imposes no greater liability upon him than if the action had been originally brought by him in such representative capacity. (*Reade agt. Waterhouse*, 52 N. Y. R., 587.)
10. In December, 1869, plaintiffs attached property belonging to defendants. The attachment lien was dissolved by defendants giving an undertaking in pursuance of the statute. The action in which the attachment was issued was defended, and, pending its continuance, in October, 1872, defendants were adjudicated bankrupts. Upon a motion to stay proceedings in the action until defendants' discharge in bankruptcy, *held*, that more than four months having elapsed, the attachment could not be invalidated under section 14 U. S. Bankrupt Law, and that the result of the attachment was a vested right, subject only to the right of the debtor to substitute an undertaking prescribed by law. (*Holyoke agt. Adams*, 2 S. C. R., 1.)
11. *Held*, also, that the sureties in the undertaking, having assumed the payment of the debt alleged, when established, in consideration of the delivery of the attached property, became the debtors of the plaintiffs, on condition that their demand was proven and judgment obtained, and the plaintiffs were entitled to prosecute the action to judgment, notwithstanding the proceedings in bankruptcy. (*Id.*)



## Digest.

12. An attachment was issued upon an undertaking in the sum of \$1,000, and over \$100,000 was seized thereunder. *Held*, that the court has power to regulate and control undertakings given in applications for provisional remedies, and could in this case require an additional undertaking for a larger sum. (*Whitney agt. Deniston*, 2 S. C. R., 471.)

## ATTORNEY.

1. The rule that knowledge by a solicitor is knowledge by the client, where the solicitor is himself the borrower has never been adopted in this state. (*Hope Ins. Co. agt. Cambrelling*, 1 Hun, 493.)
2. The lien of an attorney for his costs, on the judgment recovered, is subject to the right of set-off, in a proper action against the client for that purpose. When, however, the client assigns the judgment, or the costs accrued and to accrue in the action, to his attorney, as security for his costs, the opposite party loses his right of set-off, as the assignment becomes operative before the right of set-off attaches. The right of set-off does not attach until the judgment sought to be set-off has been actually recovered. (*Firmenich agt. Bovee*, 1 Hun, 532.)
3. An attorney acquires a lien for his costs upon the recovery of a judgment, and where notice of the lien is given to the judgment debtor the court will protect the lien. But the retaining an attorney to prosecute an action and its commencement by him gives him no lien upon what may, in the event of a trial, be recovered therein. (*Pulver agt. Harris*, 52 N. Y. R., 73.)
4. An attorney has a lien upon a bond and mortgage in his hands for foreclosure not only for the costs and charges in the suit but

for any sum due him from the owner for other professional business, and this lien attaches to moneys collected or received upon the judgment. But one member of a firm of attorneys has no lien for an individual demand upon such papers received by his firm. (*B. G. Savings Bank agt. Todd*, 52 N. Y. R., 489.)

5. An attachment is a proper remedy against an attorney who retains money and refuses to pay it over that justly belongs to his client, and good faith in withholding the money is no ground for exemption from such remedy. (*Id.*)
6. A defendant has a right to assign to his attorney the prospective costs against his adversary in consideration of the services to be rendered by the attorney in earning such costs, and where such transfer has been made, in case the defense is successful, the claim of the attorney to a judgment for the costs cannot be defeated by setting off against the same a prior judgment in favor of the plaintiff against the defendant. (*Perry agt. Chester*, 53 N. Y. R., 240.)
7. An attorney, properly qualified and practicing as such, in the absence of a statutory provision or of a rule of court prohibiting it, can recover for services rendered upon the employment of a client, although he may not have been formally admitted to practice in the court where the services were rendered. Even if there be a statute or rule prohibiting such a recovery unless there has been a formal admission, yet, if the services are rendered by a firm, one of whom is duly admitted, the partners may recover in a joint action for such services. (*Harland agt. Lilienthal*, 53 N. Y. R., 438.)
8. In an action by an attorney for services, evidence to show the nature and importance of the controversy, in which the services were

## Digest.

rendered, what results hung upon it in other matters, and how other matters affected it and increased its gravity, is proper upon the question of the value of the services. (*Id.*)

9. Where an attorney is called as an expert to speak of the value of professional services it is within the discretion of the court to reject questions put to the witness, upon cross-examination, as to the income derived by him from the practice of his profession; such testimony has not so direct a bearing upon the question of the capacity of the witness to speak as an expert, as to give defendant a right to it. (*Id.*)

## ATTORNEY AND CLIENT.

1. Defendant agreed in writing to give plaintiff, who was her attorney in certain actions against her husband, one-third of the amount realized from such actions for his services and disbursements for counsel, &c. It appeared that plaintiff instituted the actions for the purpose of harrassing the husband into a settlement, which purpose he accomplished by vexatious and annoying legal proceedings. Previous to making the agreement defendant had paid plaintiff for his services, &c., \$625, and under a decree entered upon the settlement, \$1,500 was allowed to the counsel employed by plaintiff, which was paid by the husband. *Held*, that equity would not interfere to enforce the agreement made by defendant, but would leave plaintiff to his action at law. (*Burling* agt. *King*, 2 S. C. R., 545.)

## B.

## A. BANKRUPTCY.

1. A claim for rent which accrued after the filing of the petition in

bankruptcy, under a lease executed prior to such filing, is not provable in bankruptcy. (*Matter of May & Berwin*, ante, 37.)

2. Where a bill is filed in the circuit court by a contesting creditor, under section 2 of the bankrupt act, to review a decision of the district court refusing to expunge a debt under section 22, the circuit court, under its discretionary power may refuse to hear the case upon the merits. (*First Nat. Bank of Troy* agt. *Cooper*, ante, 108.)
3. If the bill is filed with a double aspect, the circuit court has no jurisdiction to hear it as an original bill, although it is alleged in the bill that the creditor had no debt, and the assignee knew that fact, but neglected to appeal from the decision of the district court allowing such alleged debt. (*Id.*)
4. To sustain such bill it is necessary to allege fraud and collusion between the assignee and the creditor. *Negligence*, on the part of the assignee, is not sufficient. (*Id.*)
5. No appeal can be taken, under the eighth section of the bankruptcy act of 1867, from a decree, unless it be final. (*Clarke* agt. *Iselin* (9 *Blatchford C. C. Reps.*, p. 177) approved of. (*Platt* agt. *Seward*, ante, 206.)
6. A decree is understood to be interlocutory, whenever an inquiry as to a matter of law or of fact is directed, preparatory to a final decision. (*Id.*)
7. A decree is final when it decides and disposes of the whole merits of the cause and reserves no further questions or directions for the future judgment of the court, or in which it will not be necessary to bring the cause before the court again for its final decision. (*Id.*)

8. Although the decree as to the execution creditors, setting aside

## Digest.

their judgments and executions, may, in the one sense, be final, yet, where their alleged rights in the matter affected a fund, to which the party whose appeal was dismissed laid claim, such party had a right to be heard on the appeal, and the decree not being final until his rights were disposed of, the appeals of the others must be dismissed, as the cause cannot be taken up in fragments. (*Id.*)

9. A discharge in bankruptcy, under the act of congress of 1867, is a good defense to all liabilities incurred by the defendant prior to the filing of his petition in bankruptcy (*Stern* agt. *Nussbaum*, ante, 489.)

10. A creditor, whose rights are affected by such discharge, must resort to the remedy provided by the thirty-fourth section of said act. (*Id.*)

11. Whether the provision of section 14 of the bankrupt law relating to the dissolution of process issued by state courts is constitutional, *quere?* (*Holyoke* agt. *Adams*, 2 *S. C. R.*, 1.)

12. M. brought action against defendants, a banking firm, and attached certain property. Subsequently A., a special partner in the firm, commenced an action for dissolution and accounting, and a receiver was appointed, and in due time a decree made dissolving the partnership. Afterward a petition in bankruptcy was filed, and defendants declared bankrupts. Upon an application for an order for the receiver to turn over the assets of the firm in his hands to the assignee in bankruptcy: *Held*, that the proceeding in bankruptcy did not deprive this court of authority in the matter. This court and its receiver having first obtained possession of the property and control of the litigation, had the right to finish its proceedings before being interfered with by any other

jurisdiction. *Held*, also, that, under the bankrupt law, the attachment of M. constituted a valid lien in preference to the claim of the assignee in bankruptcy. (*Appleton* agt. *Bowles*, 2 *S. C. R.*, 568.)

13. It has been the uniform course of decisions, both in regard to insolvent and bankrupt discharges, that the debtor must plead his discharge when he has the opportunity, and if he omits to plead it, the court will not relieve him on motion. (*Rudge* agt. *Rundle*, 1 *S. C. R.*, 649.)

## BILL OF EXCEPTIONS.

1. A bill of exceptions should contain only a concise statement of facts, presenting the points intended to be relied upon as ground of error, or simply so much of the evidence as may appear to be requisite for that purpose. (*Tweed* agt. *Davis*, 1 *Hun*, 252.)

2. The court cannot determine whether any particular thing occurred on the trial; that is necessarily within the province of the justice settling the case or bill. (*Id.*)

3. The justice cannot be compelled by mandamus to change his decision. (*Id.*)

4. A large number of written propositions was presented at the conclusion of the evidence, which the court was requested, by the defendant's counsel, to instruct the jury to be the law. In many of these, the court differed from the defendant's counsel in the charge which was given to the jury; and, as that was concluded, and the jury were about to retire, the defendant's counsel stated that they excepted, for the defendant, to each refusal, modification or departure which had been made in the charge, from the propositions submitted. *Held*,



## Digest.

that the defendant's counsel were not entitled to insert, in the bill of exceptions, specific exceptions to the several portions of the charge which they considered constituted such refusals, modifications or departure. (*Id.*)

5. Plaintiff in error was convicted of perjury at a court of sessions, held on August 27th, 1872, and sentenced. On August 26th, 1873, a bill of exceptions was settled by the county judge and justices of sessions of the county where the conviction was had, none of whom took part in the trial, or were, at the time thereof, members of the court. *Held*, that no bill of exceptions had been settled as required by law. The same court which tries a criminal must settle the bill of exceptions, and such settlement must take place before the final adjournment of the court, at which the trial is had. (*Wood agt. The People*, 1 *Hun*, 381.)

## BILLS AND NOTES.

1. The holder of a promissory note, not knowing the residence of an indorser thereof, inquired of an assistant internal revenue assessor of the district within the bounds of which such residence was. The assessor said he knew the indorser, and that he resided at P. Notice of demand of payment, refusal and protest of the note was sent by mail to the indorser at P. He did not live at P., but at A., five miles distant, to which place the notice was forwarded, and he received it nine days after it was sent. *Held*, that the holder of the note used due diligence, and the indorser was liable. (*Harger agt. Bemis*, 1 *S. C. R.*, 460.)
2. A check drawn upon a bank, dated March 8, 1871, was received for value by another bank May 2, 1872. The drawer and payee resided and both banks were located

in the same place. *Held*, that the bank did not receive the check in the usual course of business, and the drawer was not cut off from a defense to it on the ground that it had passed into the hands of a *bona fide* holder without notice. (*Coring agt. Altman*, 1 *S. C. R.*, 494.)

3. The consideration of the check was an agreement to pay the payee the sum named therein for his services as assignee in bankruptcy over and above the fees and compensation allowed by law. *Held*, that the agreement was in violation of section 45 of the United States bankruptcy act, the consideration of the check illegal, and the check void. (*Id.*)
4. A promissory note was made by four persons jointly. One of the makers died. The holder of the note, after it became due, brought action thereon against the representatives of the deceased maker. The surviving makers were not made parties and the complaint did not allege that they were insolvent, that plaintiff had exhausted his remedy at law against them or that he had taken any steps to collect of them. *Held*, that the action, being one at law, could not be maintained in that form against the personal representatives of the deceased maker, even though the survivors were insolvent at the time of its commencement. (*Bentz agt. Thurber*, 1 *S. C. R.*, 645.)

## BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. It is now the settled law that mere negligence, however gross, is not sufficient to deprive a party of the character of a *bona fide* holder. There must be proof of bad faith—that alone will deprive him of that character. (*Chapman agt. Rose*, ante, 13.)

## Digest.

2. Where the evidence on the trial tended very strongly to show that the signature of the defendant to the note sued upon, was obtained from him through a very gross and fraudulent imposition perpetrated upon him by one M.; that when he signed it he supposed he was signing a duplicate order for a hay-fork and two grappling pulleys, for which he had engaged to pay, and was signed as such without examination or reading it, upon the statement of M., with whom he was dealing, that such was its character. (*Id.*)

3. *Held*, there does not appear to have been any physical obstacle to the defendant's reading the paper before he signed it. He understood that he was signing a paper by which he was about to incur an obligation of some sort, and he abstained from reading it; and having signed an obligation without ascertaining its character and extent, which he had the means of doing, upon the representation of another, he put confidence in that person, and if injury ensued to an innocent third person, by reason of that confidence, his act was the means of the injury and he must answer for it. (*Id.*)

See PAYMENT.

*Terry* agt. *Wait*, ante, 52.

See GUARANTY.

*Tuton* agt. *Thayer*, ante, 180.

See STOLEN BONDS.

*Dutchess County Mu. Ins. Co.* agt. *Hachfield*, ante, 330.

4. Where a promissory note was delivered by the defendants, note brokers, to the plaintiff who was also a note broker, for sale, and the plaintiff sold the note to a customer of his, all parties believing at the time that the drawers of it were solvent, when in fact they were then insolvent, and the purchaser on learning that fact immediately called upon the plaintiff

with the note, and the latter received it back and returned to the purchaser the consideration paid for it. (*Stewart* agt. *Orvis*, ante, 518.)

5. *Held*, that the defendants were liable to the plaintiff for the amount of the note; for, in accepting a return of the note and repaying the money to the purchaser, the plaintiff did no more than the defendants, who had acted through him were bound legally and in conscience to do—the plaintiff had succeeded to all the rights and remedies of the purchaser. (*Id.*)

## BILLS, NOTES, CHECKS.

1. The import of the certification of a check by a bank is a statement that the bank holds sufficient funds of the drawer applicable to its payment, and an agreement that it will retain those funds and pay the check when presented. (*Cooke* agt. *State Nat. Bank*, 52 N. Y. R., 96.)

2. The cashier of a bank has authority to certify a check when the drawer has funds. Without funds, as between him and the bank, he has no such power; but, as between the bank and a *bona fide* holder of a check so certified, as the certification is apparently within the scope of the authority of its cashier, the bank cannot dispute the fact that there are funds. (*Id.*)

3. A *bona fide* holder only can enforce the liability against the bank in the absence of funds. (*Id.*)

4. Where the holder of a check presents the same to the drawee when due, and procures it to be certified instead of paid, it is as between him and the drawer a payment, and the latter is discharged from

## Digest.

liability thereon. (*First Nat. Bank* agt. *Leach*, 52 N. Y. R., 350.)

5. The giving of a bill of exchange drawn by one party in exchange for the promissory note of the other for the same amount furnishes a good consideration for the latter. (*Newman* agt. *Frost*, 53 N. Y. R., 422.)

6. The indorser of a note or the drawer of a draft is not discharged by an omission to demand payment and to give notice of non-payment where such omission could not possibly operate to his injury, but such injury is presumed until it is made to appear that no damage could have resulted. Mere proof of the insolvency of the maker or drawer is not sufficient, and will not excuse the neglect. (*Smith* agt. *Miller*, 52 N. Y. R., 545.)

## BONA FIDE HOLDER.

See **STOLEN BONDS.**

*Dutchess County Mu. Ins. Co.* agt. *Hackfield*, ante, 330.

1. Where application was made to the plaintiff by one G. for a loan of money, and the plaintiff instead of the money gave G. a promissory note of another party, which he held, to get discounted at G.'s bank for the benefit of G., and G. without getting it discounted turned it out to the defendants, his creditors, before maturity, in part payment to them of an antecedent debt due from G., held, that the defendants were *bona fide* holders of the note for value. (*McGuire* agt. *Sinclair*, ante, 360.)

## BOOKS OF ACCOUNT.

See **EVIDENCE.**

*Krom* agt. *Levy*, ante, 97.

## BREACH OF CONTRACT.

See **INJUNCTION.**

*World Mutual Life Ins. Co.* agt. *Bund* "Hand in Hand," ante, 32.

## BREACH OF PROMISE OF MARRIAGE.

1. In an action for a breach of promise of marriage, the complaint laid the time of the making of the promise on the 15th day of March, 1869, and at divers times prior to that date in the year 1868 and 1869. Evidence was admitted of a promise in 1866. Held, that the variance was not material, it not appearing that defendant was misled by it to his prejudice. (*Fowler* agt. *Martin*, 1 S. C. R., 377.)

## BROOKLYN (CITY OF).

1. In order to give a magistrate jurisdiction in summary proceedings instituted by the grantee of a tax title from the city of Brooklyn, as authorized by the charter of that city (*Laws of 1854, chap. 384, title 5, § 33*), the affidavit presented must show that the applicant is entitled to the actual possession of the premises and that the occupant holds in hostility to his title. An affidavit stating that the person in possession refused to deliver the same upon demand is insufficient. (*People ex rel.* agt. *Andrews*, 52 N. Y. R., 445.)
2. The summons in such case must be made returnable in not less than three nor more than five days. A summons returnable upon the same day it is issued is irregular, and gives no jurisdiction to enter judgment upon default of appearance on the part of the occupant. (*Id.*)
3. A writ of *certiorari* is properly awarded to review such proceed-



## Digest.

ings upon the application of one who was owner of the premises when the tax was levied, and where the proceedings are against his tenant. (*Id.*)

4. The granting of a writ in such case is in the discretion of the court; if improvidently granted it may be quashed upon motion; but where no motion to quash or supersede it is made, and judgment is passed by the court below upon the questions raised by the return, the objection that the relator is not the person entitled to sue out the writ will not be entertained upon appeal. (*Id.*)

## BROKERS.

1. Where a broker, who is employed to sell property at a given price and for an agreed commission, has opened a negotiation with a purchaser, and the principal, without terminating the agency or the negotiation so commenced, takes it into his own hands and concludes a sale for a less sum than the price fixed, the broker is entitled at least to a ratable proportion of the agreed commission. (*Martin* agt. *Silliman*, 53 N. Y. R., 615.)
2. Where in a negotiation for the exchange of real estate a broker is employed by both parties, with notice that he is acting in the matter for the other, and with such notice, each agrees to pay him his commissions, he can recover them of both. (*Rouse* agt. *Stevens*, 53 N. Y. R., 621.)

## BURDEN OF PROOF.

1. Where letters of administration have been granted upon the estate of one dying intestate in the county of the surrogate, the *onus* is upon one disputing the title and authority of the administrator to show a want of jurisdiction in the surrogate to grant the letters. (*Welch* agt. N. Y. C. R. R. Co., 53 N. Y. R., 610.)

## C.

## CASES REVERSED, OVERRULED, CRITICISED, QUESTIONED, DISTINGUISHED, DISAPPROVED, LIMITED OR EXPLAINED.

- Aveson* agt. *Kinnaird* (6 East, 188, 450). (1 S. C. R.)
- Ayers* agt. *Lawrence* (63 Barb., 458, 151). (*Id.*)
- Battle* agt. *Coil* (26 N. Y., 404, 143). (*Id.*)
- Berner* agt. *Mittnacht* (2 Sweeney, 582, 290). (*Id.*)
- Buchan* agt. *Sumner* (2 Barb. Ch., 165, 515). (*Id.*)
- Bolen* agt. *Crosby* (49 N. Y., 187, 143). (*Id.*)
- Bunge* agt. *Koop* (48 N. Y., 225, 654). (*Id.*)
- Carr* agt. *Carr* (52 N. Y., 251, 489). (*Id.*)
- Chamberlain* agt. *Chamberlain* (43 N. Y., 424, 585). (*Id.*)
- Chapman* agt. *McKay* (47 N. Y., 670, 532). (*Id.*)
- Cobb* agt. *Harmon* (29 Barb., 472; S. C., 22 N. Y., 148, 558). (*Id.*)
- Fasnacht* agt. *Stehn* (53 Barb., 650, 622). (*Id.*)
- Gawtry* agt. *Dorn* (51 N. Y., 84, 535). (*Id.*)
- Getty* agt. *Binsse* (49 N. Y., 385, 646). (*Id.*)
- Gould* agt. *Town of Sterling* (17 N. Y., 492., 134). (*Id.*)
- Hannah* agt. *McKellip* (49 Barb., 342, 290). (*Id.*)
- Harmony* agt. *Bigham* (12 N. Y., 99, 551). (*Id.*)
- Hudson* agt. *Caryl* (44 N. Y., 553, 592). (*Id.*)
- Kortright* agt. *Buffalo Commercial Bank* (20 Wend., 91, 49). (*Id.*)
- Lanning* agt. N. Y. C. R. R. Co. (49 N. Y., 531, 529). (*Id.*)
- Larkin* agt. *Mann* (56 Barb., 267, 268). (*Id.*)
- Larkins* agt. *Larkins* (3 Bos. & Paul., 16, 441). (*Id.*)
- Lawrence* agt. *Miller* (16 N. Y., 235, 462). (*Id.*)
- Lawrence* agt. *Fox* (20 N. Y., 268, 465). (*Id.*)

## Digest.

- Livingston* agt. *Tanner* (14 N. Y., 64, 94). (*Id.*)
- Levy* agt. *Village of Sandy Hill* (40 N. Y., 451, 539). (*Id.*)
- McBurney* agt. *Wellman* (42 Barb., 390, 489). (*Id.*)
- McPherson* agt. *Clark* (3 Bradf., 92, 440). (*Id.*)
- Messner* agt. *People* (45 N. Y., 1, 656). (*Id.*)
- Myers* agt. *Burns* (33 Barb., 401; 35 N. Y., 269, 116). (*Id.*)
- Oswego Starch Factory* agt. *Dolloway* (21 N. Y., 458, 639). (*Id.*)
- People* agt. *Jackson* (3 Park. Cr., 391, 610). (*Id.*)
- People* agt. *Kerr* (37 N. Y., 188, 548). (*Id.*)
- People* agt. *Real* (42 N. Y., 270, 570). (*Id.*)
- People* agt. *Sawyer* (52 N. Y., 296, 115). (*Id.*)
- Raonson* agt. *Penn. R. R. Co.* (2 Abb. Pr. [N. S.], 220; S. C., 48 N. Y., 212, 227). (*Id.*)
- Rowley* agt. *Empire Ins. Co.*, 36 N. Y., 550, 287). (*Id.*)
- Rundell* agt. *Lahey* (40 N. Y., 513, 418). (*Id.*)
- Rupp* agt. *Blanchard* (34 Barb., 627, 144). (*Id.*)
- Shaw* agt. *Smith* (3 Keyes, 316, 509). (*Id.*)
- Starin* agt. *Town of Genoa* (23 N. Y., 439, 134). (*Id.*)
- Town of Duanesburgh* agt. *Jenkins* (46 Barb., 294, 223). (*Id.*)
- Valton* agt. *National Ins. Co.* (20 N. Y., 32, 509). (*Id.*)
- Voorhees* agt. *Childs, Ezer.* (17 N. Y., 654, 646). (*Id.*)
- Warner* agt. *Erie Railway Co.* (39 N. Y., 468, 528). (*Id.*)
- Wetmore* agt. *Parker* (52 N. Y., 450, 586). (*Id.*)
- Williams* agt. *N. Y. C. R. R. Co.* (16 N. Y., 97, 548). (*Id.*)
- Wolfe* agt. *Goulard* (18 How., 64, 627). (*Id.*)
- Bank of Albion* agt. *Burns* (46 N. Y., 170), followed, 60. (3 S. C. R.)
- Barney* agt. *Steamboat Martin* (8 Alb. L. J., 54), followed, 600. (*Id.*)
- Bliss* agt. *Swab* (48 Barb., 342), followed, 445. (*Id.*)
- Brown* agt. *Weber* (38 N. Y., 187), followed, 418. (*Id.*)
- Carpenter* agt. *Griffin* (9 Paige, 310), followed, 381. (*Id.*)
- Carris* agt. *Com'rs of Waterloo* (2 Hill, 443), distinguished, 362. (*Id.*)
- Clark* agt. *Baird* (9 N. Y., 188), followed, 634. (*Id.*)
- Dickson* agt. *McCoy* (39 N. Y., 400), explained, 289. (*Id.*)
- Garretson* agt. *Clark* (Hill & Den., 162), followed, 141. (*Id.*)
- Holmes* agt. *Holmes* (57 Barb., 305), followed, 648. (*Id.*)
- Hackenstine's Appeal* (70 Penn. St., 102), criticised, 237. (*Id.*)
- Kentish* agt. *Tatham* (6 Hill, 372), followed, 468. (*Id.*)
- Kenyon* agt. *People* (26 N. Y., 203), explained, 410. (*Id.*)
- Montgomery Co. Bank* agt. *Albany City Bank* (8 Barb., 398; S. C., 7 N. Y., 459), distinguished, 122. (*Id.*)
- O'Brien* agt. *Bowes* (4 Bosw., 657), limited, 506. (*Id.*)
- Overseers of Clayton* agt. *Beedle* (1 Barb., 104), followed, 33. (*Id.*)
- People ex rel. Ellis* agt. *Flagg* (15 How., 553), limited, 19. (*Id.*)
- People* agt. *Flagg* (17 N. Y., 584), followed, 65. (*Id.*)
- People* agt. *Van Nort* (64 Barb., 205), followed, 63. (*Id.*)
- Roosevelt* agt. *Carpenter* (28 Barb., 426), followed, 8. (*Id.*)
- Samble* agt. *Merchant's Ins. Co.* (1 Hall, 560), distinguished, 552. (*Id.*)
- Sanford* agt. *Sanford* (61 Barb., 304), followed, 644. (*Id.*)
- Smith* agt. *Brady* (17 N. Y., 173), followed, 365. (*Id.*)
- Stokes* agt. *People* (53 N. Y., 164), followed, 223. (*Id.*)
- Terpenning* agt. *Corn Exchange Ins. Co.* (43 N. Y., 279), distinguished, 633. (*Id.*)
- Viner* agt. *N. Y., &c., Steamboat Co.* (50 N. Y., 23), followed, 598. (*Id.*)
- Voorhees* agt. *McGinnis* (48 N. Y., 278), distinguished, 285. (*Id.*)
- Ætna N. B'k* agt. *Fourth N. B'k* (46 N. Y., 82), distinguished. (*Van Alen* agt. *Am. N. B'k*, 52 N. Y. R., 11.)
- Fisher* agt. *Clisbee* (12 Ill., 344), disapproved. (*Wyckoff* agt. *Queens Co. Ferry Co.*, *id.*, 34.)
- Powell* agt. *Mills* (37 Mass., 691), disapproved. (*Wyckoff* agt. *Queens Co. Ferry Co.*, *id.*, 34.)

## Digest.

- Wilson* agt. *Hamilton* (8 *Ohio* [N. S.], 722), disapproved. (*Wyckoff* agt. *Queens Co. Ferry Co.*, *id.*, 34.)  
*Fly* agt. *N. H. St. Co.* (53 *Barb.*, 207), overruled. (*McAndrew* et al. agt. *Whitlock*, *id.*, 51.)  
*Hyde* agt. *Trent. Nav. Co.* (5 *Term R.*, 389), limited. (*McAndrew* et al. agt. *Whitlock*, *id.*, 52.)  
*S. F. M. Co.* agt. *The Tangier* (1 *Clif.*, 396), distinguished. (*McAndrew* et al. agt. *Whitlock*, *id.*, 51.)  
*The Grafton* (*Olcott Adm. R.*, 43; *S. C.*, 1 *Blatch.*, 173), distinguished. (*McAndrew* et al. agt. *Whitlock*, *id.*, 51.)  
*Cope* agt. *Cordova* (1 *Ravle*, 203), distinguished. (*McAndrew* et al. agt. *Whitlock*, *id.*, 51.)  
*Leavitt* agt. *Thompson* (56 *Barb.*, 542), reversed. (*Leavitt* agt. *Thompson*, *id.*, 62.)  
*People* agt. *Nostrand* (46 *N. Y.*, 375), distinguished. (*People* ex rel. *Kingsland* agt. *Palmer*, *id.*, 87.)  
*Osborn* agt. *B'k of U. S.* (9 *Wheat.*, 738), distinguished and limited. (*Cook* agt. *State Nat. B'k*, *impl'd*, *ec.*, *id.*, 107.)  
*Moore* agt. *Littel* (41 *N. Y.*, 66), distinguished. (*Livingstone* et al. agt. *Greene* et al., *id.*, 123.)  
*Pratt* agt. *Coman* (37 *N. Y.*, 440), limited. (*Oary* agt. *White* et al., *id.*, 142.)  
*Coover's Appeal* (29 *Penn.*, 9), criticised and limited. (*Menagh* agt. *Whitwell* et al., *id.*, 156.)  
*Doner* agt. *Stauffer* (1 *Penn.*, 198), criticised and limited. (*Menagh* agt. *Whitwell* et al., *id.*, 159.)  
*Ex parte Ruffin* (6 *Vesey*, 119), distinguished. (*Menagh* agt. *Whitwell* et al., *id.*, 160.)  
*Dimon* agt. *Hazard* (32 *N. Y.*, 65), distinguished. (*Menagh* agt. *Whitwell* et al., *id.*, 160.)  
*Robb* agt. *Mudge* (14 *Gray*, 534), distinguished. (*Menagh* agt. *Whitwell* et al., *id.*, 167.)  
*Smith* agt. *Howard* (20 *How.*, 121), distinguished. (*Menagh* agt. *Whitwell* et al., *id.*, 172.)  
*Baker's Appeal* (31 *Penn.*, 76), distinguished. (*Menagh* agt. *Whitwell* et al., *id.*, 172.)  
*Dunham* et al. agt. *Sage* (5 *Lans.*, 451), reversed. (*Dunham* et al. agt. *Sage*, *id.*, 229.)  
*Markham* agt. *Jaudon* (41 *N. Y.*, 236), distinguished. (*Bryan* agt. *Baldwin*, *id.*, 236.)  
*Barron* agt. *Eldredge* (100 *Mass.*, 455), distinguished. (*Rogers* et al. agt. *Wheeler* et al., *id.*, 268.)  
*Lake Ont., etc.*, *R. R. Co.* agt. *Mason* (16 *N. Y.*, 451), distinguished. (*People* ex rel. *Irwin* et al. agt. *Sawyer*, *id.*, 300.)  
*In re Tax-payers of Greene* (43 *How.*, 515), criticised and limited. (*People* ex rel. *Irwin* et al. agt. *Sawyer*, *id.*, 302.)  
*Justice* agt. *Lang* (42 *N. Y.*, 493), limited and distinguished. (*Justice* agt. *Lang*, *id.*, 323.)  
*Williams* agt. *Williams* (4 *Seld.*, 525), questioned. (*Holmes* et al. agt. *Mead* et al., *id.*, 337.)  
*People* agt. *Batchelor* (22 *N. Y.*, 128), overruled. (*People* ex rel. *Williamson* agt. *McKinney*, *id.*, 379.)  
*Fisher* agt. *N. Y. C. R. R. Co.* (46 *N. Y.*, 644), distinguished. (*Suydam* agt. *Smith*, *id.*, 388.)  
*Washburn* agt. *McInroy* (7 *J. R.*, 135), distinguished. (*Suydam* agt. *Smith*, *id.*, 389.)  
*Von Latham* agt. *Libby* (38 *Barb.*, 339), distinguished. (*Miller* agt. *Adams*, *id.*, 413.)  
*Hopkins* agt. *Appleby* (1 *Stark.*, 338), disapproved and criticised. (*Day* et al. agt. *Pool* et al., *id.*, 420.)  
*Reed* agt. *Randall* (29 *N. Y.*, 358), distinguished. (*Day* et al. agt. *Pool* et al., *id.*, 420.)  
*McCormick* agt. *Dawkins* (45 *N. Y.*, 265), distinguished. (*Day* et al. agt. *Pool* et al., *id.*, 420.)  
*Fordham* agt. *Smith* (46 *N. Y.*, 683), distinguished and explained. (*Warner* agt. *N. Y. C. R. R. Co.*, *id.*, 440.)  
*Hayes* agt. *Hayes* (21 *N. J. Eq.*, 265), distinguished. (*Wetmore* et al. agt. *Parker* et al., *id.*, 465.)  
*Morris* agt. *Mowatt* (2 *Paige*, 593), distinguished and explained. (*Raynor* agt. *Selmes* et al., *id.*, 581.)  
*Dana* agt. *Munson* (23 *N. Y.*, 564), limited. (*Jackson*, *Receiver*, *ec.*, agt. *Van Slyke*, *id.*, 645.)  
*Andrews*, *Receiver*, agt. *Glenville Woolen Co.* (50 *N. Y.*, 282), distinguished. (*Disbrow* agt. *Garcia* et al., *id.*, 655.)



## Digest.

- J. Russell Mfg. Co. agt. N. H. Stbt. Co.* (50 *N. Y.*, 121), explained. (*J. Russell Mfg. Co. agt. N. H. Stbt. Co.*, *id.*, 657.)
- Bornsdorf agt. Lord* (41 *Barb.*, 211); *S. C.* (17 *Abb.*, 169), limited. (*Beach agt. Reynolds et al.*, 53 *N. Y. R.*, 5.)
- Roach agt. La Farge* (43 *Barb.*, 616); *S. C.* (19 *Abb.*, 67), limited. (*Beach agt. Reynolds et al.*, *id.*, 5.)
- Clinton agt. Myers* (46 *N. Y.*, 511), distinguished. (*Waffle agt. N. Y. C. R. R. Co.*, *id.*, 13.)
- Bultymore agt. Cooper* (46 *N. Y.*, 236), distinguished. (*Pinckney agt. Hegeman, sheriff, &c.*, *id.*, 35.)
- Peck agt. Smith* (1 *Conn.*, 103), explained. (*Munn agt. Worrall*, *id.*, 47.)
- Nat. Bk. of Chemung agt. City of Elmira* (6 *Lans.*, 116), reversed unless modified. (*Nat. Bk. of Chemung agt. City of Elmira*, *id.*, 49.)
- Barhyte agt. Shepherd* (35 *N. Y.*, 238), distinguished and limited. (*Nat. Bk. of Chemung agt. City of Elmira*, *id.*, 56.)
- Swift agt. City of Poughkeepsie* (37 *N. Y.*, 511), distinguished and limited. (*Nat. Bk. of Chemung agt. City of Elmira*, *id.*, 56.)
- R. and S. R. R. Co. agt. Davis* (43 *N. Y.*, 137), distinguished. (*In re appln. Fowler*, *id.*, 63.)
- Spaulding agt. Strang* (37 *N. Y.*, 135), distinguished and explained. (*Haydock et al. agt. Coope et al.*, *id.*, 74.)
- Spaulding agt. Strang* (38 *N. Y.*, 9), distinguished and explained. (*Haydock et al. agt. Coope et al.*, *id.*, 74.)
- Allen agt. Brown* (5 *Lans.*, 280), distinguished. (*Moore agt. Pitts*, *id.*, 91.)
- People ex rel. Dilcher agt. Ger. U. Ev. Ch. of Buffalo* (3 *Lans.*, 434), reversed. (*People ex rel. Dilcher agt. Ger. U. Ev. Ch. of Buffalo*, *id.*, 103.)
- People ex rel. agt. Bd. Met. Police* (26 *N. Y.*, 316), limited. (*People ex rel. agt. Batchellor, supr.*, &c., *id.*, 138.)
- Bk. of Rome agt. Village of Rome* (18 *N. Y.*, 38), distinguished. (*People ex rel. agt. Batchellor, Supr.*, &c., *id.*, 138.)
- People ex rel. agt. Flagg* (46 *N. Y.*, 401), distinguished. (*People ex rel. agt. Batchellor, supr.*, &c., *id.*, 138.)
- Olcott agt. Bd. of Suprs.* (16 *Wal.*, 678), distinguished and disap-
- proved. (*People ex rel. agt. Batchellor, supr.*, &c., *id.*, 142.)
- Markham agt. Jaudon* (41 *N. Y.*, 235), overruled as to damages. (*Baker agt. Drake et al.*, *id.*, 217.)
- Leggett agt. Hunter* (19 *N. Y.*, 446), distinguished and limited. (*Brevoort et al. agt. Grace et al.*, *id.*, 256.)
- Wood agt. Henry* (40 *N. Y.*, 124), distinguished. (*Roberts agt. Prosser et al.*, *id.*, 263.)
- Crary agt. Goodman* (22 *N. Y.*, 170), explained and distinguished. (*Sands agt. Hughes et al.*, *id.*, 296.)
- Livingston agt. Peru Iron Co.* (9 *Wend.*, 511), distinguished. (*Sands agt. Hughes et al.*, *id.*, 296.)
- Moore agt. Mayor, &c.*, (8 *N. Y.*, 110), limited. (*Simar agt. Canaday*, *id.*, 304.)
- Martine agt. Intern'l L. Ins. Soc. of London* (62 *Barb.*, 181), reversed. *Martine agt. Intern'l L. Ins. Soc. of London*, *id.*, 339.)
- Robinson agt. Intern'l L. A. Soc.* (42 *N. Y.*, 54), limited. (*Martine agt. Internat'l L. Ins. Soc.*, *id.*, 344.)
- Quimby agt. Vanderbilt* (17 *N. Y.*, 306), distinguished. (*Milnor agt. N. Y. and N. H. R. R. Co.*, *id.*, 369.)
- Hart agt. R. and S. R. R. Co.* (8 *N. Y.*, 37), distinguished. (*Milnor agt. N. Y. and N. H. R. R. Co.*, *id.*, 370.)
- Weed agt. S. and S. R. R. Co.* (19 *Wend.*, 534), distinguished. (*Milnor agt. N. Y. and N. H. R. R. Co.*, *id.*, 370.)
- Burnell agt. N. Y. C. R. R. Co.* (45 *N. Y.*, 184), distinguished. (*Milnor agt. N. Y. C. R. R. Co.*, *id.*, 370.)
- Leggett agt. Mut. L. Ins. Co. of N. Y.* (64 *Barb.*, 23), reversed. (*Leggett agt. Mut. L. Ins. Co. of N. Y.*, *id.*, 394.)
- Burwell agt. Jackson* (5 *Seld.*, 535), distinguished. (*Leggett agt. Mut. L. Ins. Co. of N. Y.*, *id.*, 398.)
- Intern'l Bk. agt. Bradley* (19 *N. Y.*, 245), explained. (*Landers agt. S. I. R. R. Co.*, *id.*, 459.)
- Haggerty agt. People* (6 *Lans.*, 332), reversed. (*Haggerty agt. People*, *id.*, 476.)
- Noyes agt. Clark* (7 *Paige*, 179), distinguished. (*Bennett agt. Stevenson*, *id.*, 510.)
- Dusenbury agt. Hoyt* (45 *How. Pr.*, 147), reversed. (*Dusenbury agt. Hoyt*, *id.*, 521.)

## Digest.

*Anderson* agt. *R. L. and N. F. R. R. Co.* (9 *How.*, 533), limited. (*In re B. and A. R. R. Co.*, *id.*, 578.)

## CAUSE OF ACTION.

1. One who has sustained damage, peculiar to himself, from a common nuisance, has a cause of action against the person erecting or maintaining the nuisance, although a like injury has been sustained by numerous others. (*Francis* agt. *Schoellkopf*, 53 *N. Y. R.*, 152.)
2. A purchaser upon a sale under a void execution, who has paid the purchase-money in good faith, without actual knowledge of the invalidity of the process, to the party who procured the sale, the latter knowing that the sale gave no title, can maintain an action against such party to recover back the money paid. (*Schwinger* agt. *Hickok*, 53 *N. Y. R.*, 280.)
3. Knowledge will not be imputed to the purchaser in such case in order to make out that the payment was voluntary. (*Id.*)
3. Upon the application of the relator, a writ of certiorari was issued to review his conviction for assault and battery, in the court of special sessions, in the city of New York, on the ground that the respondents, who, acting as police justices, constituted the said court, had no lawful authority to hold the same, the act under which they were appointed being unconstitutional. *Held*, that the police justices, if not such *de jure* were such *de facto* with color of title, and that their acts must be obeyed and respected, until judgment of ouster be pronounced against them. Having apparent authority to act, and having rendered judgment between the prisoner and the people, neither can, in this collateral way, call in question the title of the judges. (*Coyle* agt. *Sherwood*, 1 *Hun.*, 272.)

## CERTIORARI.

1. Where a town board of assessors had performed certain duties of a judicial character in pursuance of statute: *Held*, that a delay of over two years in applying for a writ of certiorari to review the same, was a sufficient reason for dismissing such writ. (*People* agt. *Hill*, 1 *S. C. R.*, 154.)
2. An overseer of the poor of a town, as relator, obtained a common-law writ of certiorari to review proceedings in a bastardy case instituted by him. After the writ was served and return thereto made, his term of office expired. *Held*, that the certiorari was a special proceeding and not an
4. A writ of certiorari is properly awarded to review summary proceedings by the grantor of a tax title from the city of Brooklyn upon the application of one who was owner of the premises when the tax was levied, and where the proceedings are against his tenant. (*People ex rel.* agt. *Andrews*, 52 *N. Y. R.*, 445.)
5. It is within the discretion of the supreme court to grant or withhold a common-law certiorari, and its decision cannot be reviewed in this court. (*People ex rel.* agt. *Hill*, 53 *N. Y. R.*, 547.)
6. Unreasonable delay in applying for the writ may be a ground for refusing it and for quashing it, even after a hearing on the return thereto. (*Id.*)

## Digest.

7. The fact that the relator has no other remedy does not deprive the court of this discretionary power. (*Id.*)

## CHARGE TO JURY,

1. Where counsel choose to rely on a *general exception* to the charge of the judge to the jury respecting the impeachment of a witness, stated, perhaps, in unguarded language, but other portions of the charge upon that question are correct, the exception cannot be sustained. (*White* agt. *McLean*, ante, 193.)
2. It is the duty of the counsel to call the attention of the judge specifically to that part of the charge which he considers objectionable, at the time it is made, and if not then corrected, a special exception should be taken. (*Id.*)

## CHARGE.

1. Writ of error to review the conviction of the plaintiff in error, at the court of general sessions, upon an indictment for an assault with intent to kill. Before the case was submitted to the jury, the prisoner's counsel requested the court to charge that he could not be convicted, under the indictment, for an assault with a sharp, dangerous weapon, with intent to do bodily harm, and the court so charged. *Held*, that the charge having been made at his request, he could not afterward object to it, although it was clearly erroneous; nor could he have been prejudiced by this error, as the jury by their verdict, negatived the idea that the crime committed by him was anything less than that charged in the indictment. (*Slattery* agt. *The People*, 1 *Hun*, 311.)

2. The judge refused to instruct the jury as to the punishment of the prisoner, if convicted. *Held*, that this was correct; the jury had nothing to do with the punishment, nor had the degree thereof any possible right to influence their verdict. (*Wood* agt. *People*, 1 *Hun*, 381.)

## CHATTEL MORTGAGE.

1. Where property covered by a chattel mortgage is in the possession of a third person, an immediate delivery thereof is not necessary. (*Smith* agt. *Post*, 1 *Hun*, 516.)
2. A mortgage provided that in case of default in payment, or in case the mortgagees should at any time deem themselves unsafe, they might take possession of the property and sell the same. *Held*, that this provision was for the benefit of the mortgagees, and authorized them to take possession when, in their judgment, they deemed it best for the safety of their demands so to do, and that no proof was required to show that they considered themselves unsafe, as the legal presumption would be that such was the fact, when possession was taken before the mortgage was due. (*Id.*)
3. The fraud of the mortgagor will not affect the rights of the mortgagee to the property mortgaged, unless he was a party or privy to it, and received the mortgage with the intent to hinder, delay or defraud the creditors of the mortgagor. (*Id.*)
4. Where a mortgage is made to two persons to secure separate and distinct debts, the knowledge and fraudulent intent of one of them will not affect the other. The mortgage will be void as to one and good as to the other. (*Id.*)



## Digest.

5. A *bona fide* purchaser, before maturity, of a promissory note, secured by a chattel mortgage, takes the mortgage as he takes the note, free from any equities which existed in favor of third parties while it was held by the mortgagee. (*Gould agt. Marsh*, 1 *Hun*, 566.)

## COMMISSION.

1. When issue is joined as to one of several defendants, a commission may be issued to take testimony out of state, although issue is not joined as to all the defendants. An order granting a commission in such a case is not appealable. (*Treadwell agt. Pomeroy*, 2 *S. U. R.*, 470.)

## COMMISSION ROGATORY.

1. The plaintiff applied to the court for a commission to be issued to the French courts, to enable him to examine two witnesses orally, on the ground that one of the witnesses had already been examined on commission, and, as he claimed, testified falsely, and that he feared the other would do so. *Held*, that the application was properly denied. The mode of taking testimony abroad, is established by the Revised Statutes, and it is not to be departed from, unless the court cannot otherwise obtain the testimony. (*Froude agt. Froude*, 1 *Hun*, 76.)

## COMMON CARRIERS.

1. Where the buyer orders goods purchased to be sent by a particular mode of conveyance, and they are delivered to the carriers specified by him, the delivery on the part of the vendor is complete, and the title to the goods passes by the delivery from the consignor

to the consignee. (*Ransom agt. Holland*, *ante*, 292.)

2. But where the shipment of the goods by the consignor is not made according to the directions of the buyer, the title remains in the consignor. And if the goods are deposited at the end of the carrier's route, notice thereof should be given to the consignor and not the consignee, where the carrier refuses to deliver them to the connecting line, which is to take them to their destination on the ground that the liabilities of the latter are greater in extent than the exemption contained in the original contract of shipment. (*Id.*)
3. Where the goods are destroyed by fire while on deposit, without the proper notice given to the consignor or owner of the refusal to deliver them to the connecting carrier, the carrier who received them is liable to the owner or consignor for the loss. (*Id.*)
4. Especially is this the case where the carrier had known for several years the regulation established by the connecting line, and the carrier had been required to change its forms in consequence of it. (*Id.*)

## CONFLICT OF LAW.

1. This court is bound by, and will enforce, the law as the court of appeals declares it, notwithstanding the decision of the United States supreme court, except upon the particular case upon which the federal tribunal has rendered its decision. (*Town of Venice agt. Breed*, 1 *S. U. R.*, 130.)
2. The existence of a judgment in a court of South Carolina, decreeing payment of a mortgage out of the personal estate of a deceased person situated here, will not accomplish such object here. The judgment has no extra territorial

## Digest.

force, and only applies to personal property situated in South Carolina. (*Rice* agt. *Harbeson*, 2 S. C. R., 4.)

3. A nation within whose territory personal property is situated has as entire dominion over it, while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there. (*Id.*)

4. While it is a settled principle, that where two tribunals have concurrent jurisdiction, the one which first obtains jurisdiction of the parties and of the subject-matter has the right to determine the controversy, the courts of this state will not stay a defendant, who is a non-resident, from prosecuting his action in the forum of his own residence. (*Barry* agt. *Mut. Life Ins. Co.*, 2 S. C. R., 15.)

5. Plaintiff and T., her husband lived in Massachusetts. She left him and went to Vermont, where she obtained a divorce upon the ground of his abandonment of her. In that action, personal service of some of the papers was admitted by T., who waived all objections to the service, and the judgment was obtained by default. Plaintiff then married defendant in this state. In an action against defendant for divorce, defendant set up that plaintiff was still the wife of T. *Held*, that the cause of action against T. not having arisen in Vermont, or while the parties resided there, and the service on T. not being in that state, its courts had no jurisdiction to annul the marriage between plaintiff and T., and the decree to that effect was therefore a nullity. (*Moe* agt. *Moe*, 2 S. C. R., 647.)

## COMPLAINT.

1. It is not proper to serve a *supplemental complaint*, without leave

of the court. (*Soher* agt. *Fargo*, ante, 288.)

See PLACE OF TRIAL.

*Christy* agt. *Kiersted*, ante, 467.

2. A complaint must always show title in the plaintiffs of the subject-matter of the action, or such an interest therein as indicates them to be proper parties to the litigation; otherwise it fails to state facts sufficient to constitute a cause of action in favor of plaintiffs against defendant. This objection may be taken at the trial, and need not be raised by demurrer. (*Moselman* agt. *Caen*, 1 Hun, 647.)

## CONSTITUTIONAL LAW.

1. According to the provisions of the constitution of this state (art. 1, § 7), when private property is to be taken for public use—the opening of streets, &c.—*compensation* must be made by means of a jury, or by not less than three commissioners, appointed by a court of record, as shall be prescribed by law. (*Menges* agt. *City of Albany*, ante, 244.)

2. The act of 1870, chapter 77, which relates to the city of Albany, and certain provisions of section 1 of title 7 of said act (*Sess. Laws*, 1870, pp. 159, 179), providing for proceedings to take the real estate belonging to any person for the purpose of laying out and opening any street, &c., requires the common council to nominate twelve discreet and reputable persons, freeholders, &c., and to apply to the supreme court, or any judge thereof, or the recorder of said city, for the appointment of three commissioners from the persons so nominated; and said judge or recorder shall proceed to draw from a box, containing, on separate ballots, the names of the persons so nominated, the names of three persons, who, unless objected

## Digest.

- to or challenged, &c., shall be commissioners, for inquiring, assessing and apportioning the damages to the owners of the property required to be taken. (*Id.*)
3. *Held*, that this enactment is in direct violation of the seventh section of the first article of the constitution aforesaid. (*Id.*)
4. The appointment of the three commissioners which the constitution contemplates is to be made by the court of record, or a judge thereof exercising *judicial discretion*; not by a ministerial act, in drawing three names selected by the common council from twelve ballots deposited in a box. (*Id.*)
5. And where three commissioners have thus been drawn in pursuance of the act, and have performed duties as such commissioners under the act, they cannot be tortured into a *jury* for the purposes required by the constitution. A constitutional jury, in such case, requires more than three men, even if they were regularly drawn and in other respects unobjectionable. (*Id.*)
6. The tax levy act of 1869, in reference to the city of New York, is not unconstitutional and void. The decision of the general term below deciding the contrary, *overruled*. (*Sullivan* agt. *Mayor, &c.*, *N. Y.*, ante, 491.)
- See MANDAMUS.*  
*People ex rel. N. Y. and Harlem R. R. Co.* agt. *Havemeyer*, ante, 494.
7. The act of 1873, chapter 139, Session Laws, 1873, page 237, provides that "while said Fall Brook Coal Company shall have an office and place of business in this state, they may sue and be sued the same as if they were a corporation of the state of New York, and for that purpose shall be deemed a resident corporation of this state." (*Fall Brook Coal Co.* agt. *Lynch*, ante, 520.)
8. The plaintiff being a corporation organized under the laws of the state of Pennsylvania, brought this action against the defendant, a resident of the county of Onondaga in this state, and laid the venue in the county of Schuyler, in this state, where it kept an office and place of business. The defendant duly made a demand that the place of trial be changed to the county of Onondaga, which was refused, and thereupon the defendant moved to thus change the place of trial. (*Id.*)
9. *Held*, that although the subject of the bill is not expressed in the title, the act cannot be regarded as "private or local," within the meaning of the constitution, and is therefore not unconstitutional. (*Id.*)
10. The plaintiff having in all things complied with the provisions of said act relating to its keeping an office and place of business within the county of Schuyler, the motion must be denied. (*Id.*)

## CONTEMPT.

*See SUPPLEMENTARY PROCEEDINGS.*  
*Driggs* agt. *Smith*, ante, 215.

1. If an order within the jurisdiction of the court, is imprudently or erroneously granted, the remedy of the party aggrieved is by application to vacate it, or by appeal; it cannot be reviewed upon an application to punish for disobedience of it; so long as it remains in force it is the duty of all parties to obey it; so also if facts existed, at the time of the granting of the order, which would have authorized a modification thereof, but which were not then disclosed, or if such facts occur subsequently,



## Digest.

they will not avail as an excuse for not obeying the order; in the former case that should have been presented upon the application, in the latter they can only be used upon application to modify the order; an order cannot be nullified or modified by indirection upon allegations in answer to an alleged contempt for disobedience thereof, nor is it a defense in proceedings to punish for contempt, that an appeal has been taken from the order disobeyed. If the proceedings have not been stayed, the party has a right to take every step for the enforcement of his civil remedy, the same as if no appeal was taken. (*People ex rel. agt. Bergen*, 53 N. Y. R., 404.)

2. It is no objection to an order, adjudging a party in contempt, that the court suspends final action for a period, to enable him to comply with the original order, or to perform any act as a substitute for such compliance; it does not deprive the court of jurisdiction or prevent a final decision upon the merits, and the party cannot complain that an opportunity has been offered him to purge the alleged contempt. (*Id.*)
3. Upon appeal from the order punishing for contempt, the party in contempt cannot have the benefit of a compliance with the suggestion of the court made upon such suspension of the final decision, where such compliance was not shown in the court below. If he has any claim founded upon such action to be absolved from the contempt, he should apply to that court for relief. (*Id.*)

## CONTRACT.

1. At the trial, the plaintiff applied to the referee for leave to amend the complaint by alleging that he had sustained damages by reason of the false and fraudulent represen-

tations contained in the complaint, to the amount of \$5,000, and demanding a recovery of such damages; and that the same, because of the vendor's insolvency, should be declared a lien upon any amount found due from him on account of the sale. The referee permitted this amendment to be made against the objection of defendants; *held*, that this was error; that the amendment introduced a new and independent cause of action into the case, not within the issues referred to the referee to try; that the referee should have suspended the trial, until relief could be obtained by special motion, on notice before the court. (*Sinclair agt. Neill*, 1 Hun, 80.)

## CORPORATIONS.

1. Where the object and scope of the plaintiff's complaint (he being a stockholder) are the forfeiture of all the corporate rights of the defendant—a life insurance company formed under the general law of 1853—and an injunction asked for which will suspend its operations, under and by virtue of the thirty-ninth, fortieth and forty-first sections of 2d Revised Statutes, 484, Edmonds' edition, for violation of duty in making annual statements and other irregularities under its charter, it will be held bad on demurrer. (*Fisher agt. World Mu. Life Ins. Co.*, *ante*, 451.)
2. The exception contained in section 11 of the act of 1853 expressly excludes the application of the Revised Statutes to the violations of the act of 1853. (*Id.*)
3. The remedy for any supposed violation, including such as the plaintiff alleges, is to be found under the act of 1853. That is the exclusive remedy in respect to annual statements, and in respect to every violation of the act. (*Id.*)

## Digest.

*See PLACE OF TRIAL.*

*Fall Brook Coal Co. agt. Lynch, ante, 520.*

4. A dividend earned, but not declared, belongs to the person owning the stock when the dividend is declared, and not to the owner of the stock before such declaration. (*Brundage agt. Brundage, 1 S. C. R., 82.*)
5. In a deed of real property belonging to a church, the grant was by the church by its trustees, and the deed stated that the trustees in their official capacity, "have hereunto set our hands and seals, hereby certifying that said church has no corporate seal." It was signed by the trustees as such, and a seal affixed to each name. *Held*, that the church having no formal seal, might adopt one, and that annexed to the name of each trustee was the corporate seal of the church. Adding several impressions of the seal would not avoid it. (*Christie agt. Gage, 2 S. C. R., 344.*)

## COSTS.

1. By a mutual mistake of the parties and referee, as to the date, one of the demands of the appellant, which he was entitled to, was not allowed. As soon as it was discovered, respondent offered to deduct from the judgment in his favor the amount of the demand. *Held*, that the respondent should not be charged with costs of appeal by reason of the mistake. (*Perrine agt. Hotchkiss, 2 S. C. R., 370.*)
2. Where a party, by the final judgment, does not recover general costs, but costs of the appeals only, he is not entitled to an additional allowance. (*Savage agt. Allen, 2 S. C. R., 474.*)
3. In an action in a justice's court, plaintiff claimed \$50, and defendant set up a counter-claim for a like amount. The justice rendered a judgment in favor of defendant for his counter-claim, from which plaintiff appealed. Upon a new trial in the county court, the jury rendered a verdict of no cause of action on the part of plaintiff, but did not find in favor of defendant's counter-claim. *Held*, that defendant was bound to make no offer and was entitled to costs in the county court. (*Church agt. Miller, 2 S. C. R., 583.*)
4. In an action for partition, one of the defendants appealed from an order therein to the general term, where the order was affirmed, and to the court of appeals, where the appeal was dismissed. One of the other defendants was an infant, who appeared by a guardian and put in a general answer. The infant's interests were identical with those of the plaintiff, and the guardian was represented during the whole litigation by the same counsel as the plaintiff. *Held*, that the guardian was not entitled to costs as against the appealing defendant, upon the appeal to the court of appeals, in the absence of an explicit direction of the court granting him costs. (*Halsted agt. Halsted, 2 S. C. R., 673.*)
5. Where a defendant, after issue joined, served upon the plaintiffs an offer to allow judgment to be taken against him for a certain sum with costs, and the plaintiffs failed to recover a more favorable judgment, the defendant, in such case, is not entitled to an extra allowance, although it be conceded that the action was a difficult and extraordinary one. (*Magnin agt. Dinmore, ante, 11.*)
6. Where judgment is ordered for plaintiff (by default) on the ground of the frivolousness of the defendants' demurrer, the plaintiff is entitled to an *extra allowance of*

## Digest.

costs under section 309 of the Code. (*First Nat. Bank of Plattsburgh* agt. *Bush*, ante, 78.)

7. Where the issue, in an action of trespass, is made by the plaintiff and the trial is had upon the plaintiff's right to the possession of the premises, after his alleged non-payment of rent, the title to real property comes in question on the trial. (*Powers* agt. *Conroy*, ante, 84.)
  8. And where the referee finds in favor of the plaintiff for twenty-five dollars damages upon disputed evidence as to the payment of rent, the plaintiff is entitled to the costs of the action. (*Id.*)
  9. The statute makes the appeal from the decree of a surrogate's court to this court *res nova*, for the purposes of costs, and this court is clothed with full discretion in the matter. (*Dupuy* agt. *Wurts*, ante, 225.)
  10. By section 318 of the Code, the appellate court is *pro hac vice* made the court of original jurisdiction in granting an additional allowance of costs. (*Id.*)
  11. Where a cause originating in a surrogate's court, and the decree on appeal was affirmed by the general term of this court, and again, on appeal, was affirmed by the court of appeals, which court directed that the costs of all the parties in that court and in the courts below should be paid out of the estate, *held*, that the order of the special term granting an additional allowance should be affirmed. (*Id.*)
- See SHERIFFS.  
*Crofut* agt. *Brandt*, ante, 263.
12. Where counsel, at or previous to the trial, agreed that the amount for which the plaintiff claims to recover in the action shall be fixed at a certain sum, this sum will

form the basis for an extra allowance of costs. (*Board of Comrs. of Pilots* agt. *Spofford*, ante, 479.)

13. Upon appeals from orders to this court, where costs are allowed by the court, the statute (*Code*, § 367, sub. 6) gives full costs. (*Brown* agt. *Leigh*, 52 N. Y. R., 78.)
14. In an action for the construction of a will, brought by the executors, the special term of the supreme court has power to make an allowance to them for counsel fees. (*GROVER and FOLGER, JJ., dissenting.*) (*Wetmore* agt. *Parker*, 52 N. Y. R., 450.)
15. As to whether this court can review on appeal the amount of such allowance, *quere*. (*Id.*)
16. Proceedings in the nature of a *quo warranto* under chapter 2 of title 13 of the Code are a civil action, and the prevailing party is entitled to costs. (*People ex rel.* agt. *Clute*, 52 N. Y. R., 576.)
17. Where the complaint in such action alleges that defendant has usurped the office in question, and that the relator is entitled to it, and issue is taken upon both allegations, in case judgment is given against the defendant ousting him from the office, the people and relator, plaintiffs, are the prevailing party, and as such are entitled to costs, although the judgment also determines that the relator is not entitled to the office. (*Id.*)
18. The remedy by attachment, given by section 321 of the Code against an assignee *pendente lite* to enforce the payment of costs for which he is made liable by that section was intended only to apply as against assignees taking and holding in their own right. If such assignee holds in a representative capacity, specified in section 317, in the absence of misconduct or bad faith, he is protected from personal liability by that section, and sec-



## Digest.

tion 321 imposes no greater liability upon him than if the action had been originally brought by him in such representative capacity. (*Reade* agt. *Waterhouse*, 52 N. Y. R., 587.)

19. An assignee in bankruptcy is a trustee of an express trust within the meaning of section 317, and the fact that the trust fund is under the jurisdiction of another tribunal than that in which the action is prosecuted, does not affect his liability for costs. (*Id.*)
20. It seems that, under section 321, an assignee is not personally chargeable with costs accruing before the assignment. (*Id.*)
21. A surrogate can only award taxable costs to litigants. It is error to allow a sum in gross to the counsel of the prosecuting party. (*Reed* agt. *Reed*, 52 N. Y. R., 651.)
22. Since the Code (§ 321) an assignee of a cause of action assigned after suit brought is liable for the costs therein, irrespective of the question as to whether or not he, subsequent to the assignment, took any substantial part in the prosecution of the action. (*In re Dowling* agt. *Bucking*, 52 N. Y. R., 658.)
23. An assignee, however, to whom a claim is assigned, simply as collateral security, is not liable. (*Id.*)

## COUNTER-CLAIM.

1. In an action upon a bond, the defendant set up, as a counter-claim, an account for professional services rendered the obligee. The plaintiff, in answer to the counter-claim, alleged that the bond was delivered as a full settlement, on a final accounting between the parties. The referee having found that the counter-claim accrued before the accounting took place, held, that it was

barred by such settlement and the giving of the bond. (*Mount* agt. *Ellingwood*, 2 S. C. R., 527.)

## COURT OF APPEALS.

1. This court has control over its own remittitur, in whosoever hands it may be, until it is actually and regularly filed in the court below; and an order of any one of the judges temporarily staying the filing thereof is valid and operative, although not accompanied by motion papers or notice of motion. (*Cushman* agt. *Hatfield*, 52 N. Y. R., 653.)
2. Rule 16, of this court, authorizing orders by a single judge to stay proceedings and making them effectual when served with motion papers has reference to general stays of proceedings in causes pending here. (*Id.*)
3. The fact that a remittitur was handed to the clerk, who was served with a stay immediately thereafter, and who thereupon refused to file it and tendered it back to the party offering it, does not constitute a filing. (*Id.*)

## COVENANTS.

1. A plaintiff, in an action brought to restrain a defendant from carrying on any kind of trade or business on certain lands, must show a privity of estate between himself and defendant in order to move the court in his behalf, because, when the land sought to be charged by the covenant is not derived from the covenantee, the consideration for the covenant is foreign to the land, and the title of the covenantor and of those taking title from him is unaffected by the covenant. (*Trustees of Columbia College* agt. *Lynch*, ante, 273.)

## Digest.

## CRIMINAL LAW.

1. The defendant was indicted for an assault with a deadly weapon (an axe), with intent to kill. *Held*, that the evidence of experts as to the location, character and probable consequences of the wound inflicted was proper, as bearing upon the intent of the defendant. *Held*, also, that evidence that defendant, who had been in the employ of the person assaulted, had done his work intentionally so as to injure his employer, was proper. It was proper to show that at the time of the assault defendant was maliciously and revengefully disposed toward the person assaulted. Testimony of defendant tending to show defendant's intention at a time previous to the commission of the assault, *held*, inadmissible. (*People* agt. *Kerrains*, 1 S. C. R., 333.)
2. Under the statute it is not necessary that the person committing the assault should entertain the intent essential to the crime of murder. An assault and battery with a deadly weapon, and with an intent to maim, or to commit any felony, is sufficient to constitute the offense. (*Id.*)
3. Where four were jointly indicted for felony, *held*, that three of those indicted had no right to require that the fourth should be tried jointly with them. (*Armsby* agt. *People*, 2 S. C. R., 157.)
4. Upon a challenge to a juror for principal cause, it appeared that he had owned a farm; had conveyed it away "last spring," and did not then own any real estate. He had taken back a mortgage, but could not tell, of his own knowledge, that he was assessed "this year" for any personal property. He had not been so assessed the preceding year, but had then been assessed for real estate. The trial took place in June. The court sustained the challenge. *Held*, no error. (*Id.*)
5. A treasury note, of the denomination of fifty dollars, was handed to the plaintiff in error, to take ten cents out of it, for the payment of a glass of soda-water; he appropriated the entire amount of the note to his own use. *Held*, that, upon proof of these facts, he could be convicted of larceny. (*Hilderbrand* agt. *The People*, 1 Hun, 19.)
6. The return stated that the prisoner appeared in his own proper person, and was, in due form of law, tried and convicted. *Held*, that, as it nowhere stated that he left the court after he so appeared, the presumption is, that he remained and was present during the whole of the trial. (*Id.*)
7. The clerk's entry of the judgment pronounced, is not required to state what succeeded the verdict and preceded the sentence, and it need not appear from it that the prisoner was asked, before sentence, whether he had anything to say why the sentence should not be pronounced upon him for the offense of which he had been convicted. (*Id.*)
8. To review the conviction and judgment in criminal cases, requires a formal judgment record to be made, signed and filed, and if that is not shown by the return to have been done, the court has nothing before it on which the case can be properly considered. (*Id.*)
9. When a record is made, signed and filed as the statute prescribes, and it does not appear from it, that the inquiry, whether he had anything to say, was made of the defendant before he was sentenced, then it may be necessary, for that reason, to reverse the judgment pronounced, but not the conviction. (*Id.*)

## Digest.

10. A person, convicted of a crime, who escapes from custody before sentence, and flees the jurisdiction of the court, thereby waives and suspends his rights to have exceptions, taken on the trial, reviewed by the appellate court, and such waiver and suspension can be avoided by him only by returning to the custody and judgment of the law. (*In matter of Genet*, 1 Hun, 292.)

11. Such criminal cannot demand, as matter of right, the statutory benefits conferred on those who submit to the jurisdiction and judgment of the courts. (*Id.*)

12. A party, in contempt of court, will not be permitted to ask a favor of the court, nor to take any aggressive proceedings against his adversary. (*Id.*)

13. Evidence of transactions of the prisoner, other than those connected with the offense charged, may be given for the purpose of proving guilty knowledge. (*Coleman* agt. *The People*, 1 Hun, 596.)

14. On the trial, the prosecution was permitted to give evidence of declarations of the prisoner, respecting collateral facts bearing more or less directly upon the question in controversy, and then to prove that such declarations were untrue, *held*, not to be error. (*Id.*)

15. The plaintiff in error was indicted, tried and convicted of bigamy, in the court of sessions of Oswego county. The porof showed that the second marriage took place in Yates county, and that the prisoner was apprehended there; and the prisoner's counsel moved that the prisoner be discharged, as the offense was not committed, nor the prisoner apprehended, in Oswego county. *Held*, that the court erred in refusing to discharge the prisoner; the statute providing that, for a second or other marriage, the person committing such offense may

be tried in any county in which such person may be apprehended. (*Collins* agt. *The People*, 1 Hun, 610.)

## CRIMINAL TRIAL.

1. A failure to give evidence of good character cannot be considered by the jury as a circumstance against the accused. (*Ormsby* agt. *The People*, 53 N. Y. R., 472.)

2. An indictment upon a statute must state all the facts and circumstances which constitute the statutory offense, and upon the trial the proof as well as the allegations must bring the case within the statute. (*Wood* agt. *The People*, 53 N. Y. R., 511.)

3. A wife is not a competent witness in a criminal action or proceeding against her husband. (*Wilke* agt. *The People*, 53 N. Y. R., 525.)

4. After the testimony has been closed in a criminal trial and the case has been summed up to the jury, it is within the discretion of the court to reject further testimony offered by the prisoner. (*Id.*)

5. No power is given to an appellate court to interfere with that discretion by the provisions of the statute in relation to the court of general sessions of the peace for the city and county of New York (§ 3, chap. 339, *Laws of 1855*), which authorize an appellate court to interpose if it shall be satisfied that the verdict against the prisoner is against the weight of evidence, or against the law, or that justice requires a new trial. All that justice, in a legal sense, requires, is a fair and full trial according to the prescribed forms of law. (*Id.*)

6. Said section in any view is only applicable to a conviction for a capital offense and to an offense



## Digest.

where the *minimum* punishment is imprisonment for life. (*Id.*)

7. So also it is only in such cases that the accused has a right of review in an appellate court without taking an exception in the trial court. (*Id.*)

## CROSS-EXAMINATION.

See WITNESS.

White agt. *McLean*, ante, 193.

## D.

## DAMAGES.

1. Where damages are assessed on the dissolution of an injunction, judgment cannot be entered against the *sureties* on such assessment. They are not necessarily parties to that proceeding and the assessment may be made without notice to them. (*Hovey* agt. *Rubber Tip Pencil Co.*, ante, 289.)
2. *It seems*, that an action upon the undertaking is the only mode in which the *sureties* can be charged. (*Id.*)

## DEBTOR AND CREDITOR.

1. Where it appeared that the grantee, prior to receiving a conveyance from the grantor, was a large creditor of the latter, having, in good faith, loaned and advanced to him at different times a large amount of money, *held*, that there was nothing unlawful or improper in the grantor's preferring the grantee to his other creditors, and transferring some of his property in payment of his indebtedness; and the latter had a perfect right to receive the same in satisfaction of his just indebtedness, provided no fraudulent intent entered into

the transaction. (*Laidlaw* agt. *Gilmore*, ante, 67.)

2. Where the amount of indebtedness of the grantor, of over \$13,500, was discharged in consideration of the conveyance of the premises from him to the grantee, and where it appeared by the decided weight of evidence that said premises were not worth over \$14,000 or \$15,000, *held*, that this was not such inadequacy of consideration as to justify the court in setting aside the deed on that ground. (*Affirmed by the court of appeals* March term, 1874). (*Id.*)
3. Where the defendant was kidnapped in France and by force brought into this state against his will, through the fraudulent intrigue and management of some of his creditors here, on pretended extradition proceedings with the government of France, to answer a criminal charge here. (*Adrience* agt. *Lagrange*, ante, 71.)
4. *Held*, that those creditors who were ignorant of such proceedings in bringing the defendant here and took no part therein, could legally arrest the defendant in civil actions and proceed in them, under the jurisdiction of the court, to judgment and imprisonment, although the fraud of the other creditors who were engaged in such proceedings precluded them from arresting the defendant in any civil action. (*Id.*)

## DEED.

1. The certificate of acknowledgment of a deed need not state that the evidence of a witness who swears to the identity of the grantors, is "satisfactory evidence" to the officer taking the acknowledgment; nor that the witness is known to the officer; nor that he testified to his residence. It is otherwise where a subscribing witness makes

## Digest.

an acknowledgment as such. (*Ritter* agt. *Worth*, 1 *S. O. R.*, 406.)

## DEFENSES.

1. The court has no power to require defendants to elect upon which of their defenses they will rely, where more than one is set forth in the answer, and evidence is given tending to prove their truth, unless they are so far inconsistent that both cannot properly co-exist in the same transaction. That is not the case as to the defenses of *warranty* and *fraud* in the sale of property. (*Kelly* agt. *Bernheimer*, ante, 62.)

See AGREEMENT.

*Krom* agt. *Levy*, ante, 97.

See OFFSET.

*Patterson* agt. *Patterson*, ante, 242.

2. Where a defendant wishes to defeat a recovery by the plaintiff, on the ground that the contract, upon which he sued, is illegal, being in violation of the act requiring that the designation, "& Co." shall represent an actual partner, the necessary facts must be alleged in the answer, as well as proved upon the trial. (*O'Toole* agt. *Garvin*, 1 *Hun*, 92.)

3. This action was brought to recover the price of barley, sold and delivered by the plaintiffs to the defendants. The defendants set up a warranty and a breach thereof, and that they were induced to purchase the barley by means of fraudulent representations, made by a person having charge of its sale for the plaintiffs, by which they had sustained damages, and for which they claimed an allowance. After the defendants rested, the court, upon the application of the plaintiffs' counsel, compelled them to elect upon which of their two defenses they would proceed. *Held*, that this was error. The

court has no power to require defendants to elect upon which of their defenses they will rely, where more than one is set forth in the answer, and evidence is given to prove their truth, unless they are so far inconsistent that they cannot properly coexist in the same transaction. (*Kelly* agt. *Bernheimer*, 1 *Hun*, 112.)

4. Defendants, in support of their allegations as to fraud, offered to prove statements of Tilden, who acted as plaintiffs' agent in selling the barley, made just before the sale, while the barley was being changed from the vessel in which it was loaded to the lighter, as to its quality, and that these statements were afterward communicated to the defendants, and acted upon by them; the court excluded the evidence. *Held*, that this was error. (*Id.*)

5. A cause of action *ex delicto* is not extinguished by the recovery and satisfaction of a judgment against a stranger, in nowise joined in liability with defendant, for the full amount of the damages claimed, nor is the plaintiff estopped thereby. The adjudication only acts as an estoppel between the parties thereto, or those in privity with them. (*Atlantic Dock Co.* agt. *Mayor, &c.*, 53 *N. Y. R.*, 64.)

## DIVORCE.

1. The court has no power to open a decree, granting an absolute divorce, upon proof that defendant did not receive any copy summons or notice of publication, and upon affidavits showing a defense. Section 135, subdivision 5, of the Code, deprives the court of this power. (*Brown* agt. *Brown*, 1 *Hun*, 443.)
2. The fact that there is no possibility of a husband and wife living together in harmony, is not

## Digest.

- ground for a legal separation. In such case the parties must be left to bear, as they may, the inconveniences and griefs resulting from their want of harmony and mutual quarreling. (*Davis* agt. *Davis*, 1 *Hun*, 444.)
3. By the provisions of the Revised Statutes, the court is not authorized to take possession of the property of the husband through the medium of a receiver, in the first instance, but to require security for the payment of the allowance, and to sequester his property only in the event of his neglecting to give security, or upon his default after security has been given. An order for the maintenance and support of the wife, under section 55, cannot be made, unless one of the three grounds upon which the statute authorizes a limited divorce, be established in the case. (*Id.*)
4. A judgment declaring void the marriage contract between the parties, entered *ex parte* by the plaintiff on a referee's report, *without application to the court*, is irregular. (*Blott* agt. *Rider*, ante, 90.)
5. The Code has not attempted either to enlarge or diminish the jurisdiction of this court in divorce as to cases in which it may proceed, or as to the evidence upon which a divorce may be decreed. On the contrary, the former jurisdiction is continued as it was vested when the Code was enacted. (*Id.*)
6. On an application to set aside a decree of divorce for fraud and irregularity in obtaining it, after the death of the plaintiff, the remedy is by an action in the nature of a bill of review, bringing before the court all the heirs-at-law and other persons interested in the real estate left by the decedent, and such persons as may have taken conveyances thereof subsequent to the decree, as well as the representatives of the decedent. (*Watson* agt. *Watson*, ante, 240.)
7. An application on motion and on notice simply, to the administrator of the plaintiff's estate, is not sufficient. (*Id.*)
8. The rule as to the time, place and person with whom adultery is alleged to have been committed. (*Tim* agt. *Tim*, ante, 253.)
9. The defendant, in his answer, averred that the parties with whom the adultery was committed are unknown to him. Neither did he state the times or places. *Held*, that while he was, perhaps, warranted in not giving the names of the persons because unknown to him, he is not warranted in omitting to state the times and places at which the offenses were committed. (*Id.*)
10. Irrelevant and redundant matter as defenses in such actions. (*Id.*)

## E.

## EASEMENT.

1. A person, in whose favor an easement or servitude exists, cannot be disturbed in its enjoyment by an action of ejectment or writ of possession in favor of the owner of the land on which the easement is impressed. (*Kurkel* agt. *Haley*, ante, 75.)
2. The action of ejectment is brought to recover the "*possession*" of land; and although, in such action, it may appear that the plaintiff is the owner of the fee, yet he cannot recover the *possession* when the land is subject to an easement or servitude in favor of the defendant, which would be thereby disturbed. (*Id.*)
3. In such case the judgment should disclose the estate and interest of



## Digest.

both parties, and that the plaintiff is entitled to the possession when the easement shall come to an end. (*Id.*)

## EJECTMENT.

1. A person, in whose favor an easement or servitude exists, cannot be disturbed in its enjoyment by an action of ejectment or writ of possession in favor of the owner of the land on which the easement is impressed. (*Kurkel* agt. *Haley*, ante, 75.)
2. The action of ejectment is brought to recover the "*possession*" of land; and although, in such action, it may appear that the plaintiff is the owner of the fee, yet he cannot recover the *possession* when the land is subject to an easement or servitude in favor of the defendant, which would be thereby disturbed. (*Id.*)
3. In such case the judgment should disclose the estate and interest of both parties, and that the plaintiff is entitled to the possession when the easement shall come to an end. (*Id.*)
4. Although a defendant is not in the possession of premises, the plaintiff can maintain an action of ejectment under the provisions of the statutes, basing the right upon the claim of title made by the defendant. (*Becker* agt. *Howard*, ante, 423.)
5. Where the plaintiff brings ejectment for wild and unoccupied lands, it will have to be determined upon the question who, of the parties, plaintiff or defendant, has the best title to the premises. (*Id.*)
6. The general rule is that the defendant in ejectment may show that the plaintiff has no title, for the plaintiff must always recover

upon the strength of his own title; but this does not permit the defendant to set up a permanent outstanding title in a stranger, unless he can show a lawful claim and right under such party. (*Id.*)

7. The proof is presented and relied upon by the defendant in an action of ejectment, who is out of possession and without title to defeat a recovery by one who connects himself with the last grant by the state. The fact of a prior grant by the state is wholly unavailing to the defendant for the reason that he does not connect himself with such prior grant. (*Becker* agt. *Holdridge*, ante, 429.)
8. An infant, by her guardian *ad litem*, brought action to recover possession of premises from a tenant for the life of another holding over his term, and damages for unlawfully withholding possession. *Held*, that such action could only be brought by the guardian in socage or the general guardian and not by the infant. The objection in such case, as to the party plaintiff, must be taken by demurrer. (*Seaton* agt. *Davis*, 1 S. C. R., 91.)

## EQUITY.

1. Under the well settled principles of equity which declare an act invalid, both upon the ground of mistake and fraud, the general rule in equity, that an act done or contract made, under a mistake or in ignorance of a material fact, will be applied voiding or relieving it. (*Boyd* agt. *De La Montaigne*, ante, 433.)
2. Where an assignment of a leasehold estate is made by the wife to her husband, upon misrepresentation of material facts, made by the husband to her, although the husband did not then know such

## Digest.

representation to be untrue, the court will interpose in equity and pronounce the transaction void. (*Id.*)

3. The confidential relations existing between the parties at the time entitled the wife to be relieved from the consequences of the transfer made of her estate, although the leading motive inducing it was improper and unlawful. She acted under the influence of the misrepresentations made to her by and through the agency of her husband. (*Id.*)

4. The law will not permit him to profit by an apparent advantage secured in that way, because it regards her, under the circumstances, as acting under his controlling and governing influence. (*Id.*)

5. This court is not authorized to examine and review questions of fact in any equity action. (*ALLEN and RAPALLO, JJ., dissenting.*) (*Vermilyea agt. Palmer, 52 N. Y. R., 471.*)

## EVIDENCE.

1. A referee having found facts against undisputed evidence, and neglected to find facts in accordance with such evidence given by plaintiff's own witness, in favor of defendants, as to a legacy of \$1,500, and interest, which should have been credited to defendants Wright and Babcock, the judgment was reversed and a new trial ordered as to those defendants, for that reason, and also that the action was barred by the statute of limitations. (*Taft agt. Wright, ante, 1.*)

2. The rejection of evidence offered by defendants to prove the statements made by the plaintiffs' agent, who had charge of the sale of the property, as to its value, &c., made

to the defendants' agent just before the contract was made for its purchase, was error. It was the only mode in which the fraud, if it existed, could be proved. (*Kelly agt. Bernheimer, ante, 62.*)

3. It was also error to exclude evidence of one of the defendants by whose act the purchase was made, to show that the conversation between these agents of the plaintiffs and defendants, respecting the property, was communicated to him, and that he acted on it in making the purchase. (*Id.*)

4. Where a witness on the trial, who claimed to be the owner of a store and the goods therein, turned out and delivered to the plaintiff a portion of said goods to secure a loan of money, was asked, "At that time who did these goods belong to?" after an objection by defendant as calling for a conclusion of law from the witness and being overruled, answered, "that at that time the said goods belonged to him; that they belonged to him when he gave them to the plaintiff as security;" the witness then testified that his name was up in the store, and that he was in possession of the store; he was then asked the further question, "and the owner of it at that time?" which was objected to by defendant on the same ground as the other question; which being overruled the witness answered, "yes, sir." (*Caspar agt. O'Brien, ante, 80.*)

5. Held, that these interrogatories called for a fact and not for a conclusion of law, as claimed. The witness was in a position to know how the fact in that respect was, and the questions were properly admissible. For authority on this point see *Walsh agt. Kelly* (42 Barb., 98), which involved a precisely similar question. In *Knapp agt. Smith* (27 N. Y., 277); *Sweet agt. Tuttle* (14 N. Y., 467), and *Davis agt. Peck* (54 Barb., 425), analogous

## Digest.

questions were sustained for the same reason. (*Id.*)

6. Where a surviving partner, plaintiff, introduced a *book of account* as evidence of work done and materials furnished for the defendant, kept by his deceased copartner, and the testimony of the plaintiff showed that at the time the entries were made, he knew them to be correct; that he kept all the memoranda from which the entries were transcribed; that they were usually on a slate kept for that purpose, and transcribed from that into the book by his deceased partner, sometimes every day and sometimes at intervals of two or three days; that witness generally assisted, reading therefrom from the slate—the items themselves being taken orally from the workmen and some from himself; that he saw most of the entries at the time they were made, or very soon after, and that he believed the book produced to be the original, and that the firm did work for the defendant. (*Krom* agt. *Levy*, ante, 97.)

7. *Held*, that this evidence was sufficient to allow the book to be received as evidence in the case, and the plaintiff might properly read therefrom to supply the dates and amounts of the several items which could not be otherwise given. (*Id.*)

See JUDGMENT.

*Sheriff* agt. *Smith*, ante, 470.

8. A foreign corporation appearing in an action after leave granted, or appearing and answering in an action, cannot thereafter deny its incorporation. (*Root* agt. *Great Western Railway Co.*, 1 S. C. R., 10.)

9. Where testimony is offered which is objected to, but admitted by a referee notwithstanding objection, the presumption is that the referee has held the evidence, not only to be competent, but material, and

that it may have had an influence in his finding. And it must very clearly appear that it could have had no such influence, before the court, in an action at law, can disregard the objection to it. (*Smith* agt. *Smith*, 1 S. C. R., 63.)

10. The declarations of a party to his attorney while in consultation, *held* inadmissible against the party. (*Id.*)

11. Evidence being offered, the referee received it and reserved the question of its admissibility until the final disposition of the case, when he rejected it. *Held*, that the question of admissibility should have been passed upon at the time it was raised, and not reserved. (*Waggoner* agt. *Finch*, 1 S. C. R., 145.)

12. Instructions given by a party to his attorney not in the presence of the opposing party, in respect to a settlement of matters in dispute, are inadmissible in behalf of the party giving them. (*Childs* agt. *Delaney*, 1 S. C. R., 506.)

13. When evidence is, upon its face, apparently admissible, the party objecting thereto is bound to state the grounds of his objection; but where, upon its face, it appears inadmissible, a general objection to it as improper is sufficient to call upon the party offering it to show the grounds of its admissibility. (*Id.*)

14. There is no exception to the rule that a party cannot impeach his own witness. As far as he can go is to show the witness to be mistaken or that the facts are different from the version the witness gives of them. (*Sisson* agt. *Conger*, 1 S. C. R., 564.)

## EXAMINATION OF PARTIES.

1. The court has no power to appoint a referee to take the affidavit



## Digest.

or deposition of a party to an action on a motion, on behalf of the adverse party, under the seventh subdivision of section 401 of the Code, chapter 8, which falls under the title of "motions and orders." (*Knoepfel* agt. *Kings County Fire Ins. Co.*, ante, 412.)

2. The 389th section of the Code, chapter 6, the title of which falls under the "examination of parties," positively forbids any action in aid of the prosecution or defense of another action, or any examination of a party in behalf of the adverse party, "except in the manner prescribed by this chapter." (*Id.*)

## EXCEPTIONS.

1. Where counsel choose to rely on a *general exception* to the charge of the judge to the jury respecting the impeachment of a witness, stated, perhaps, in unguarded language, but other portions of the charge upon that question are correct, the exception cannot be sustained. (*White* agt. *McLean*, ante, 193.)
2. It is the duty of the counsel to call the attention of the judge specifically to that part of the charge which he considers objectionable, at the time it is made, and if not then corrected, a special exception should be taken. (*Id.*)
3. Where conflicting evidence on the trial is given on a question of fact, which it would be error to refuse to submit to the jury on a proper request to the court, the party omitting to make such request cannot take the objection on the hearing of the exceptions that the case should have gone to the jury upon that or upon any other question of fact there might be in the case. (*McGuire* agt. *Sinclair*, ante, 360.)

4. The court will therefore decide the question of fact (a *bona fide* holder of commercial paper for value) on the weight of evidence given on the trial. (*Id.*)

5. Where exceptions are taken at the trial, the Code has provided three different modes of reviewing them: by an appeal from the judgment; by a motion for a new trial upon them at the general term, when the judge before whom the cause was tried directs that they be heard in the first instance at the general term; and by a motion for a new trial at the circuit or special term. (*Price* agt. *Keyes*, 1 *Hun*, 177.)

6. The special term cannot hear a motion for a new trial, while an order, directing the exceptions to be heard in the first instance at the general term, continues in force. (*Id.*)

7. If an exception be taken on substantially the same state of facts, and on the same point, more than once, a single statement of it is all that is proper in a bill of exceptions. (*Tweed* agt. *Davis*, 1 *Hun*, 252.)

## EXECUTION.

1. Defendant, an attorney at law, issued execution for \$4,328.48, and costs, upon a judgment for that amount. Plaintiff, the sheriff to whom the execution was directed, levied upon property sufficient to satisfy the execution and advertised it for sale. Before sale the judgment was reduced by the court of appeals to \$50 and costs, of which defendant notified plaintiff and directed him to collect only the last-named amount, which was done. *Held*, that defendant, as attorney, was liable to plaintiff for poundage. *Held*, also, that plaintiff was entitled to poundage only upon the amount collected,

## Digest.

- and not upon the whole amount named on the execution. (*Campbell* agt. *Cothran*, 1 S. C. R., 70.)
2. Whether specific articles are, in a particular case, working tools within the meaning of the statutes of exemption is a question of fact for the jury. (*Sammis* agt. *Smith*, 1 S. C. R., 444.)
  3. All the articles specified in chapter 157, of the Laws of 1842, are liable to seizure and sale on an execution issued to collect the purchase money of any one of the articles therein specified, or of any other property, which was, at the time of the passage of said act, exempt from execution. (*Snyder* agt. *Davis*, 1 Hun, 350.)
  4. An execution was issued and delivered to the sheriff of Saratoga county, in the usual form, except that, on the inside, it was directed "To the sheriff of the county of county;" on the outside, under the title of the action, were the words, "execution to Saratoga county," with the usual directions to levy, &c. *Held*, that its direction to the sheriff of Saratoga county, sufficiently appeared. (*White* agt. *Coulter*, 1 Hun, 357.)
  5. The supreme court has jurisdiction and full control over its own process, and may set aside an execution against the person, issued upon a judgment therein, after an arrest and imprisonment of the judgment debtor under and by virtue of the execution. Although by such arrest and imprisonment the execution is completely executed, yet it is not annulled. The writ is still the authority justifying the detention of the prisoner, and an order setting it aside takes away that authority and obligates his release. (*Pinckney* agt. *Hegeman*, 53 N. Y. R., 31.)
  6. Such an order, valid upon its face, is a justification to the sheriff for the release. (*Id.*)
  7. A purchaser upon a sale under a void execution, who has paid the purchase-money in good faith, without actual knowledge of the invalidity of the process, to the party who procured the sale, the latter knowing that the sale gave no title, can maintain an action against such party to recover back the money paid. (*Schweinger* agt. *Hickok*, 53 N. Y. R., 280.)
  8. Knowledge will not be imputed to the purchaser in such case in order to make out that the payment was voluntary. (*Id.*)

## EXEMPT PROPERTY.

1. An execution issued upon the recovery of a judgment for the purchase-price of a cow, which is by law exempt from execution, may be levied on property of the defendant in the execution and sold, which would be exempt by law from execution, if the judgment had not been recovered for the purchase-money of exempt property. (*Snyder* agt. *Davis*, *ante*, 147.)

## EXPRESS COMPANIES.

See COMMON CARRIERS.

*Rawson* agt. *Holland*, *ante*, 292.

## EXTRA ALLOWANCE.

1. The supreme court has power, under section 318 of the Code, to grant an allowance in appeals from the surrogate's court, nor is this power affected by the fact that an allowance has already been granted in the case by the surrogate. The case of *Seguine* agt. *Seguine* followed, and distinguished from the cases of *Wolfe* agt. *Van Nostrand* and *The People* agt. *The N. Y. Central R. R. Co.* The latter

## Digest.

cases hold that appellate courts cannot grant the allowance, because the statute gives the same, by way of indemnity, for the expense of the trial in the courts of original jurisdiction. But, by section 318 of the Code, the appellate court is, *pro hac vice*, made the court of original jurisdiction. (*Dupuy* agt. *Wurts*, 1 *Hun.* 119.)

## EXTRADITION.

1. A person who has been surrendered by a foreign government, under an extradition treaty, for the commission of a crime here, coming within the treaty stipulation, has a clear and absolute right to return to the country from which he was taken, after the purposes of justice have been satisfied as to the particular offense for which he was surrendered. (*Bacharach* agt. *Lagrange*, *ante*, 385.)
2. No other principle than that securing immunity from arrest for causes not provided for by the treaty, can either fairly or reasonably be deduced from the purposes and provisions of the constitution and laws of the United States relating to the removal of offenders from one state to another. (*Id.*)
2. Such a finding is not a special verdict, as all the material facts are not submitted; and the rule governing a special verdict, that it cannot be aided by facts appearing elsewhere on the record, does not apply, and upon appeal it will be assumed that the court below found every material fact necessary to sustain the judgment upon which there was evidence tending to establish it, and reasonably justifying such finding. (*Id.*)
3. Where an order for trial by jury of specific questions of fact in an equity action, as authorized by section 72 of the Code, is made, the findings have no greater force or effect than the findings in the old procedure by feigned issue, for which this is a substitute. The findings of the jury are ancillary to the judgment of the court, and the trial of the issue is by the latter. It may set aside the verdict and order a new trial, or find the facts itself, or it may qualify or alter the findings. If approved they become by adoption the findings of the court. (*Vermilyea* agt. *Palmer*, 52 *N. Y. R.*, 471.)

## FORECLOSURE.

- F.
- FINDINGS OF FACT AND LAW.
1. Where an isolated fact involved in an action is by consent of parties submitted to a jury, and in all other respects the trial is by the court, it is not a mistrial. The finding of the jury has the same effect as if the fact so submitted was admitted by the pleadings or by stipulation, or was conclusively established in any other way. (*Carr* agt. *Carr*, 52 *N. Y. R.*, 251.)
  1. An order of the special term made on a summary application after judgment, allowed \$100 to a referee appointed to sell under a foreclosure judgment. *Held*, that it charged the owner of the equity of redemption with a greater sum than was lawful, and therefore affected a substantial right and was appealable. *Held*, also, that a referee appointed to sell in a foreclosure action is entitled only to the same amount allowed by law to a sheriff for the performance of a similar duty. (*Innes* agt. *Purcell*, 2 *S. C. R.*, 538.)
  2. In an action to foreclose a mortgage, defendants pleaded tender of the amount due before action



## Digest.

brought. This defense was established upon the trial. *Held*, that the plaintiff was not entitled to a judgment of foreclosure, but to a money judgment against the defendants diminished by the costs of the defendants (*McCoy* agt. *O'Donnell*, 2 S. C. R., 671.)

3. In an application for a re-sale of mortgaged premises upon the ground that the premises sold did not bring their full value, the moving affidavits showed, not what was the true market, but a speculative value. *Held*, that a re-sale should not be ordered. (*Barnes* agt. *Stoughton*, 2 S. C. R., 675.)

#### FORCIBLE ENTRY AND DETAINER.

1. In proceedings under the statute relating to forcible entry and detainer, the affidavit to the complaint was in form required by § 157 of the Code for the verification of pleadings. *Held*, not such an affidavit as the statute requires. (*People ex rel. Decker* agt. *Whitney*, 1 S. C. R., 533.)
2. The verification required by the Code is nothing more in effect than a verification of the pleading upon information and belief; the affidavit required by the statute relating to forcible entry, &c., should be positive, and state the facts as of the knowledge of the affiant, or if facts are stated upon information they should be so stated, and the source of information given. (*Id.*)
3. In proceedings for forcible entry and detainer the defendant objected to the verification at the first opportunity before the county judge. Subsequently a jury was empaneled, and an inquisition found which the defendant traversed, and brought a certiorari to review the proceedings. *Held*, that defendant did not, by his subse-

quent action, waive the objection to the verification. (*Id.*)

#### FRAUD.

See PAYMENT.

*Terry* agt. *Wait*, ante, 52.

1. Where a conveyance of real estate is made for a fair and reasonable consideration, the court will not be warranted in declaring the same fraudulent and void, as against the grantee, unless either fraud or a fraudulent intent be made to appear on his part as well as on the part of the grantor. (*Laidlaw* agt. *Gilmore*, ante, 67.)
2. And although the grantee had accepted the conveyance with knowledge that the grantor was in embarrassed circumstances, that would not necessarily imply that he took it with a fraudulent intent. (*Id.*)
3. Where it appeared that the grantee, prior to receiving a conveyance from the grantor, was a large creditor of the latter, having, in good faith, loaned and advanced to him at different times a large amount of money, *held*, that there was nothing unlawful or improper in the grantor's preferring the grantee to his other creditors, and transferring some of his property in payment of his indebtedness; and the latter had a perfect right to receive the same in satisfaction of his just indebtedness, provided no fraudulent intent entered into the transaction. (*Id.*)
4. Where the amount of indebtedness of the grantor, of over \$13,500, was discharged in consideration of the conveyance of the premises from him to the grantee, and where it appeared by the decided weight of evidence that said premises were not worth over \$14,000 or \$15,000, *held*, that this was not such inadequacy of

## Digest.

consideration as to justify the court in setting aside the deed on that ground (*Affirmed by the court of appeals, March term, 1874.*) (*Id.*)

See DEBTOR AND CREDITOR.

*Adrience agt. Lagrave, ante, 71.*

5. Where goods fraudulently purchased are sought to be reclaimed by the vendor and are found in the possession of a third person, it devolves upon the latter to show that he is a *bona fide* purchaser. (*Devoe agt. Brandt, 53 N. Y. R., 462*)

6. An execution creditor does not become a *bona fide* purchaser by buying goods at a sale upon his execution, which were fraudulently purchased by the judgment debtor. (*Id.*)

## G.

## GENERAL TERM.

1. An erroneous denial of a motion to dismiss the complaint of one of several joint plaintiffs, who has shown no cause of action, is not a ground for a new trial. The general term has power and should correct the error by making the order asked for upon the trial, and if there was no other error should sustain the judgment in favor of the other plaintiffs. (*Simar agt. Canaday, 53 N. Y. R., 298.*)

## GUARANTY.

1. A *guaranty* indorsed on a promissory note in the following words: "For value received I guarantee the payment and collection of the within note, with costs, if any made," held to be a guaranty both of payment and collection. (*Tuton agt. Thayer, ante, 180.*)

2. The holder has his election to proceed, in the first instance, either against the maker or against the guarantor, and if he does proceed against the former and fails to collect, he has his remedy against the latter, as well for the costs of the former action as for the debt. (*Id.*)

## HABEAS CORPUS.

1. One Friedlander, who was in the custody of the sheriff, under an execution issued against his person in favor of Eldridge and others, applied to Mr. Justice FANCHER, on *habeas corpus*, to obtain his discharge. The sheriff, in his return, alleged that a writ of *habeas corpus* had previously been granted by Mr. Justice ROBINSON, on the application of the said Friedlander, and that the judge had then decided that he was not entitled to his discharge, and that the adjudication was made on the same facts, on which he now asks his discharge in this proceeding. To this return, the prisoner put in a traverse, denying, as a matter of fact, that the case, as then presented, had been presented to, and passed on by judge ROBINSON. To this the sheriff demurred. Held, on the demurrer, the case was not *res adjudicata*. (*People agt. Fancher, 1 Hun, 27.*)

## HIGHWAYS.

1. The relator procured an alternative *mandamus* directing the defendant to open and improve a certain highway, &c. The owners of the land through which the road ran had not released their right to damages, and damages had not been assessed. After the service of the *mandamus*, the highway was discontinued in the manner prescribed by law, which fact was set up in defendant's return. Held, that the fact that the dam-

## Digest.

ages had not been released or assessed was a complete answer to the writ. So, also, was the discontinuance. The highway was subject to discontinuance though never opened, and the discontinuance was effectual, though occurring after the service of the alternative writ. (*People ex rel. Clark agt. Commissioner of Reading*, 1 S. C. R., 193.)

## HUSBAND AND WIFE.

1. Under the well settled principles of equity which declare an act invalid, both upon the ground of mistake and fraud, the general rule in equity, that an act done or contract made, under a mistake or in ignorance of a material fact, will be applied voiding or relieving it. (*Boyd agt. De La Montaigne, ante*, 433.)
2. Where an assignment of a leasehold estate is made by the wife to her husband, upon misrepresentation of material facts, made by the husband to her, although the husband did not then know such representation to be untrue, the court will interpose in equity and pronounce the transaction void. (*Id.*)
3. The confidential relations existing between the parties at the time entitled the wife to be relieved from the consequences of the transfer made of her estate, although the leading motive inducing it was improper and unlawful. She acted under the influence of the misrepresentations made to her by and through the agency of her husband. (*Id.*)
4. The law will not permit him to profit by an apparent advantage secured in that way, because it regards her, under the circumstances, as acting under his controlling and governing influence. (*Id.*)
5. The owner of a heifer sold the same to his wife, who sold it to the plaintiff. After such sales the husband mortgaged the heifer to defendant. *Held*, that the wife was not prevented from acquiring title to the heifer by reason of the marital relation, and that plaintiff's title derived through her was valid. (*Brace agt. Gould*, 1 S. C. R., 226.)
6. A husband may transfer a valid title to personal property directly to his wife by sale and delivery for a valid consideration. (*Id.*)
7. The defendant took the heifer under the mortgage with the assistance of the mortgagor. Plaintiff resisted the taking awhile, after which he said he would fight no longer, but would look to his father (the mortgagor) for pay. *Held*, that this was not a consent to taking the heifer so as to estop plaintiff. (*Id.*)
8. Plaintiff brought this action to recover for the occupation of certain land, and for waste committed thereon. Upon the trial it appeared that the title to the land was in the husband and wife, jointly. *Held*, that she could not recover; that both must join in the action. (*Freeman agt. Barber*, 1 Hun, 433.)
9. Where a wife is injured by the negligence of a common carrier of passengers, the husband is entitled to recover for the loss of her services resulting therefrom. (*Sloan agt. The N. Y. Central and Hudson R. R. Co.*, 1 Hun, 540.)
10. In an action brought by a husband, to recover for the loss of services of his wife, resulting from injuries sustained by her, evidence of her pain and suffering is admissible to prove the extent of the injuries and the duration of the loss of her services. (*Id.*)



## Digest.

11. A wife is not a competent witness in a criminal action or proceeding against her husband. (*Wilke* agt. *The People*, 53 N. Y. R., 525.)

statute. (*Wood* agt. *The People*, 53 N. Y. R., 511.)

## I.

## IDIOT.

1. It is not irregular to appoint a stranger the committee of the person and estate of an idiot or lunatic, without notifying those who, as next of kin, will succeed the idiot or lunatic as heir. (*Matter of Owens*, ante, 150.)

## INDICTMENT.

1. After pleading not guilty to the indictment, the plaintiff in error moved to quash the indictment; the motion was denied and an exception taken. *Held*, that the motion was addressed to the discretion of the court, and was not a proper subject of exception. (*Wood* agt. *People*, 1 Hun, 381.)
2. Where the offense is sufficiently assigned in any one count in the indictment, the remainder may be rejected as surplusage, and the conviction sustained. (*Id.*)
3. In an indictment for forging and uttering a check it is not necessary to set forth indorsements appearing upon the check or a revenue stamp attached thereto. Neither form part of the check, which is a complete instrument of itself, and such omission therefore does not constitute a variance. (*Miller* agt. *The People*, 52 N. Y. R., 304.)
4. An indictment upon a statute must state all the facts and circumstances which constitute the statutory offense, and upon the trial the proof as well as the allegations must bring the case within the

## INJUNCTION.

1. The plaintiff, a mutual life insurance company entered into a contract with the defendant, a club incorporation, by which the plaintiff agreed to insure the lives of all the members of the defendant, who should be accepted by the plaintiff at the rate of the regular premiums established, or to be established by the plaintiff; to accept through the instrumentality of the defendant payment of the said premiums in weekly, monthly or quarterly installments; and to grant to the defendant certain commissions and allowances for procuring the business and actively assisting in its management, containing minute provisions as to the rights and duties of the contracting parties, and of the holders of the policies to be issued under it. It was also agreed that as long as the defendant did not number 20,000 paying members, and a single policy remained in force, the contract should not be dissolved. (*World Mu. Life Ins. Co.* agt. *Bund "Hand in Hand"*, ante, 32.)
2. Under this contract the defendant effected insurance on the lives of about 1,500 of its members so that defendant became a highly important branch of plaintiff's business. This result was obtained by the plaintiff at great cost and labor, by extending at all times liberal aid to the defendant, and by making liberal advances to the agents of the defendant to be repaid from future business. (*Id.*)
3. For certain reasons the relations between these corporations became highly unpleasant, and the defendant has taken steps to transfer its insurance business to an-

## Digest.

other life insurance company.  
(*Id.*)

4. This action was brought by the plaintiff, and an injunction granted restraining the unlawful action of the defendant in violating the contract, but not to affect the business or property of the defendant generally. (*Id.*)
5. *Held*, on this motion, that the court had searched in and outside of the contract by which the rights of the parties are to be determined, for some justification of or legal excuse for the conduct of the defendant, but had not been able to discover any. Upon this point the burden of proof rests with the defendant. (*Id.*)
6. *Held*, also, that upon well-settled principles of equity jurisprudence the plaintiff has shown itself entitled to the continuance of the injunction, until the final determination of the rights of the parties upon the trial. (*Id.*)
7. Where damages are assessed on the dissolution of an injunction, judgment cannot be entered against the sureties on such assessment. They are not necessarily parties to that proceeding and the assessment may be made without notice to them. *It seems*, that an action upon the undertaking is the only mode in which the sureties can be charged. (*Hovey* agt. *Rubber Tip Pencil Co.*, ante, 289.)
8. Where the object and scope of the plaintiff's complaint (he being a stockholder) are the forfeiture of all the corporate rights of the defendant — a life insurance company formed under the general law of 1853 — and an injunction asked for which will suspend its operations, under and by virtue of the thirty-ninth, fortieth and forty-first sections of 2d Revised Statutes, 484, Edmonds' edition, for violation of duty in making annual statements and other irregularities under its charter, it will be held bad on demurrer. (*Fisher* agt. *World Mu. Life Ins. Co.*, ante, 451.)
9. The exception contained in section 11 of the act of 1853 expressly excludes the application of the Revised Statutes to the violation of the act of 1853. (*Id.*)
10. The remedy for any supposed violation, including such as the plaintiff alleges, is to be found under the act of 1853. That is the exclusive remedy in respect to annual statements, and in respect to every violation of the act. (*Id.*)
11. When an injunction contains an order to show cause, six days thereafter, why it should not be continued during the pendency of the action, and, upon no cause being shown, the injunction is continued by order of the court, it becomes a new proceeding. (*McDonald* agt. *James*, ante, 474.)
12. Therefore, it cannot be claimed that the counsel fees paid by the defendants for the trial of the action were incurred by reason of the preliminary injunction, but rather by reason of the injunction which was continued by the order of the court. (*Id.*)
13. An injunction granted does not change the legal relation between landlord and tenant. (*Id.*)
14. Therefore, it is error for a referee to make the fair value for the use and occupation of the premises, during the time the defendants were restrained, part of the damages sustained. (*Id.*)
15. The true basis for such estimate must be the loss of rent, by reason of the insolvency of the tenants, or otherwise, incurred during the pendency of the injunction. (*Id.*)
16. In an action brought to dissolve a copartnership, it was averred in the complaint that by an agree-

## Digest.

ment made between one of the defendants and the plaintiff, that the lands of such defendant's wife (who was the other defendant) should be furnished for sale by the plaintiff, and that he and the husband should divide the proceeds; that under this agreement part of the wife's lands were sold; that by a subsequent agreement the husband and plaintiff formed a general copartnership, and it was agreed that the wife's lands should remain in such copartnership. The wife was not a party to these transactions. *Held*, that the plaintiff was not entitled to an injunction restraining the disposition by the wife of her lands. (*Jones* agt. *Welwood*, 1 S. C. R., *Addenda*, 11.)

17. Plaintiff brought action against an insurance company to recover the amount of an insurance upon the life of her husband. Certain residents of Maryland, who claimed an interest in such insurance, and to whom the policies were made payable, were joined as defendants. They appeared and defended. Afterward they brought an action against the insurance company in the United States court in Maryland, to recover the amount due upon the same policies. *Held*, that an injunction would not issue to restrain defendants from prosecuting such last-named action. (*Barry* agt. *Mut. Life Ins. Co.*, 2 S. C. R., 15.)

18. It was alleged in the complaint that defendants, a firm of stock brokers under claim of, but without right, were about to sell certain shares of stock deposited by plaintiff with them as a "margin" in a speculative transaction; that such sale would inflict irreparable injury upon plaintiff, and that the stock could not be then sold without a ruinous sacrifice by reason of a low market, and an accounting was demanded. *Held*, that plaintiff was not entitled to an injunction restraining the sale.

(*Park* agt. *Musgrave*, 2 S. C. R., 571.)

19. The court will not grant an injunction preventing a landlord from instituting summary proceedings against his tenant, on the ground that the landlord has extended the tenant's lease. The question of the extension of the lease, is one that can be properly determined in the summary proceedings. (*Rapp* agt. *Williams*, 1 *Hun*, 716.)

20. On an assessment of damages upon an undertaking given upon the granting of a temporary injunction, counsel fees upon trial are not allowable save where they are incurred solely or principally because of the injunction. (*Diabrow* agt. *Garcia*, 52 N. Y. R., 650.)

## INNKEEPER.

1. The referee before whom the case was tried gave defendant judgment for the return of the property, or its value in case a return could not be had. *Held*, that defendant was entitled to judgment, not for the whole value of the property, but only for the amount due from C. *Held*, also, that the court, on appeal, might correct the judgment so as to conform to the proofs, by reducing it to the amount of defendant's claim. (*Smith* agt. *Keyes*, 2 S. C. R., 650.)

## INSOLVENCY.

1. The invalidity of a transfer by an insolvent bank does not depend upon the knowledge of the transferee, but upon the fact of insolvency. (*Dutcher* agt. *Importers & Traders' Bank*, 1 S. C. R., 400.)

2. An assignee under the U. S. bankrupt law can maintain an action



## Digest.

to recover back moneys paid in violation of the statute mentioned. (*Id.*)

## INSURANCE.

1. A policy of reinsurance consisting of a printed form filled in by writing contained, immediately after the ordinary reinsuring clause, the following written provision: "Loss, if any, payable *pro rata* with the reassured." In a subsequent portion of the policy, among a number of qualifying printed clauses, occurred the following (also printed): "Reinsurance, in case of loss, to be settled in proportion as the sum reinsured shall bear to the whole sum covered by the reinsured company." (*Norwood* agt. *Resolute Fire Ins. Co.*, ante, 43.)
2. *Held*, that the former clause was too obscure to vary the general allegation of the reinsurer to pay, whether the primitive insurer had paid or not. (*Id.*)
3. That as the policy was not framed with the view of giving to each clause a separate meaning, but with a contrary view, the said former clause could not be deprived of its ordinary meaning, merely because other parts of the policy make a similar provision. (*Id.*)
4. That the said former clause means that the loss under the reassuring policy is payable by the reassuring company *pro rata* with the loss payable by the primitive insurer; that is, that the reinsurer is bound to indemnify the primitive insurer in the same proportion that the latter is bound to indemnify the primitive assured; and does not imply that the loss, under the reassuring policy, is not payable till the loss *has been paid* under the primitive policy; or that the loss, under the reassuring policy, is to

be paid in the same ratio as the loss *is paid* under the primitive policy. (*Id.*)

5. That payment by the reinsured is not a condition precedent to recovery against the reinsurer. (*Id.*)

## See INJUNCTION.

*Fisher* agt. *World Mu. Life Ins. Co.*, ante, 451.

## INTEREST.

1. Where, by contract for the performance of work, a certain per cent is to be deducted from the monthly payments and retained until the entire performance of the contract, the amount is due on the completion of the work, and bears interest from that time. (*Jenks* agt. *Robertson*, 2 S. C. R., 255.)
2. A referee was appointed to determine upon the priority and amount of claims to surplus moneys. He computed the claims with interest to the day of the date of his report. The special term affirmed the report, and did not postpone the day to which interest should be computed thereon. *Held*, that the general term would not review the order of the special term, it having exercised the discretion vested in it. (*Soverhill* agt. *Suydam*, 2 S. C. R., 460.)
3. Defendant claimed and was allowed for board of plaintiff \$4 per week. *Held*, that there being no evidence that the board was to be paid at the end of each week, the refusal of the referee to compute interest thereon from the end of each week and computing from the end of the year was proper. (*Leach* agt. *Leach*, 2 S. C. R., 657.)
4. The rule of interest was a question of law which could be raised

## Digest.

only by an exception so specific as to call attention to it. (*Id.*)

## J.

## JANITOR.

1. The tax levy act of 1869, in reference to the city of New York, is not unconstitutional and void. The decision of the general term below deciding the contrary, *overruled*. (*Sullivan* agt. *Mayor, &c., of N. Y.*, ante, 491.)
2. The place of janitor is not an office. He is an employe—an attendant; not an officer in any just sense of the word. (*Id.*)

## JOINT DEBTORS.

1. Where a joint judgment against two defendants is assigned to a copartnership firm, of which one of the members is one of the judgment debtors, it satisfies the judgment as against the other judgment debtor. (*Morley* agt. *Stevens*, ante, 228.)
2. Where a joint judgment debtor is summoned to show cause why he should not be bound by the judgment rendered on contract, he cannot set up as a defense to the original cause of action, the *statute of limitations*. (*Gibson* agt. *Van Derzee*, ante, 231.)
3. Section 99 of the Code provides that "an action (on contract) is commenced as to each defendant when the summons is served on him, or on a co-defendant who is a joint contractor." If the cause of action was not barred by the statute when it was originally commenced, the co-defendant summoned to answer cannot interpose it as a defense, because the action was commenced against both defend-

ants at the same time by service on one. (*Id.*)

## JUDGMENT.

See DIVORCE.

*Blott* agt. *Rider*, ante, 90.

See JOINT DEBTORS.

*Morley* agt. *Stevens*, ante, 228.

*Gibson* agt. *Van Derzee*, ante, 231.

1. A judgment recovered in a court of record of another state is not conclusive as to the jurisdiction of that court. (*Sheriff* agt. *Smith*, ante, 470.)
2. Where it appears from the record that the proof given on the trial clearly established that there was no personal service of process upon one of the joint defendants, and that he did not authorize any attorney to appear for him in the action, the complaint, in an action on the judgment here, will be dismissed as against such defendant. (*Id.*)
3. Where the certificate of the prothonotary attached to the exemplification of the record of judgment from another state is signed by the "chief clerk," whose signature is duly attested by the "presiding judge" of the court, it is sufficient. (*Id.*)
4. The alteration, by a justice, of a judgment already entered on his docket does not defeat the judgment, but it remains a judgment for the amount originally entered. (*Rose* agt. *Depue*, 1 *S. C. R.*, 16.)
5. A judgment will not be set aside because costs taxed therein have not been applied for on motion, where the right to such costs is clear. (*Hees* agt. *Nellis*, 1 *S. C. R.*, 118.)
6. In a trial before a justice of the peace the jury returned with their

## Digest.

- verdict "about midnight." The justice entered the verdict in his minutes, but did not enter it in his docket "until daylight" the next morning. *Held*, that the judgment was valid, being entered within twenty-four hours. (*Goodrich* agt. *Sullivan*, 1 S. C. R., 191.)
7. The judgment was entered thus: "5th damages \$30.00, \$4.60." The return stated that the \$4.60 was entered for costs. *Held* (*overruling Stephens* agt. *Santee*, 51 Barb., 532), that the entry was in form sufficient to constitute a judgment. (*Id.*)
8. The court has the right to impose it, as a condition of opening a default, that there shall be a reference and a speedy trial. If the defendant does not choose to take the order with the condition, he is at liberty to decline its benefits, and allow the judgment to stand; or, he may appeal from that part of the order imposing the condition. But, after proceeding upon the order, and after a judgment has been entered against him upon the referee's report, he cannot move to set aside the judgment as irregular. (*Delany* agt. *Delany*, 2 S. C. R., 530.)
9. On the seventeenth of June, a summons, without a copy of the complaint, was served on the defendant, and on the nineteenth, a copy of the complaint was left at his office; the defendant having served no notice of appearance or put in an answer, the plaintiff, on the eighth of July, entered judgment. *Held*, that the judgment was regular. (*Paine* agt. *McCarthy*, 1 Hun, 78.)
10. The authority given by the Code (§ 135) to proceed by publication against a non-resident where he has property in the state, or the suit has relation to property therein in which he has or claims an interest, is to be interpreted in view of the necessity which called for its enactment, and authorizes only a judgment *in rem*, not *in personam*. (*Schwinger* agt. *Hickok*, 53 N. Y. R., 280.)
11. To give binding effect to a judgment foreclosing infants of their equity of redemption in mortgaged premises, it is essential that the court have jurisdiction of the person and subject-matter. (*Bosworth* agt. *Vandewalker*, 53 N. Y. R., 597.)
12. The want of jurisdiction makes such a judgment void and unavailable for any purpose, and may always be set up against it when it is sought to be enforced or when any benefit is claimed under it. (*Id.*)
13. The intendment of law, however, is that a superior court of general jurisdiction has jurisdiction both of the subject-matter and of the person of the defendant until the contrary appears. (*Id.*)
14. The record of the judgment is *prima facie* evidence, and will be held conclusive until clearly and explicitly disproved, and the recitals therein may be used to establish jurisdiction. (*Id.*)
15. These general rules apply as well in case of an infant defendant as of an adult. (*Id.*)
16. It is only in case where a defendant neither answers the complaint nor appears in the action that proof of service of the summons upon him must appear in the judgment roll (*Code*, §§ 281, 139). (*Id.*)

## JURISDICTION.

1. A judgment recovered in a court of record of another state is not conclusive as to the jurisdiction of that court. (*Sheriff* agt. *Smith*, ante, 470.)



## Digest.

2. Where it appears from the record that the proof given on the trial clearly established that there was no personal service of process upon one of the joint defendants, and that he did not authorize any attorney to appear for him in the action, the complaint, in an action on the judgment here, will be dismissed as against such defendant. (*Id.*)

3. Where the certificate of the prothonotary attached to the exemplification of the record of judgment from another state is signed by the "chief clerk," whose signature is duly attested by the "presiding judge" of the court, it is sufficient. (*Id.*)

4. A firm of contractors who had a claim for work, &c., against a railroad company which was disputed, filed a mechanics' lien under chapter 529, Laws of 1870, upon which they brought suit to foreclose, and also filed a petition in bankruptcy against the company. In an action against such contractors by another contractor and the company, for an equitable adjustment of the claims of the contractors, *held*, that this court could, by injunction, restrain the firm named from continuing the bankruptcy proceedings, and should do so, especially as the parties instituting such proceedings had invoked the jurisdiction of this court to foreclose the lien. (*Pusey* agt. *Bradley*, 1 *S. C. R.*, 661.)

5. Recorders of cities have jurisdiction under 2 Revised Statutes, 704, section 1, to require disorderly persons to give security to keep the peace, and in default thereof, to commit them to the common jail. (*People* agt. *Mitchell*, 2 *S. C. R.*, 172.)

6. It is no defense to a complaint against one for a breach of the peace in neglecting to support his

wife, that he has brought an action of divorce against her, in which he has appealed from a judgment against him to the court of appeals, and that he has paid her a gross sum, awarded to her in that action, for alimony. (*Id.*)

7. In an action to set aside a conveyance, as fraudulent as against defendants' creditors, the plaintiff offered in evidence, a judgment roll in an action in which he had recovered a money judgment against the defendant. This was objected to and excluded, on the ground that the papers did not show that the summons was served on the defendant in such action. *Held*, that this was error; that where a judgment is recovered in the supreme court, jurisdiction is presumed, and no proof of it is necessary. If irregular, the judgment cannot be attacked collaterally when offered in evidence in another suit. (*Ray* agt. *Rowley*, 1 *Hun*, 614.)

## JURY.

1. The announcement of a verdict, or the bringing in of a sealed verdict by a jury, and the entry thereof by the clerk in his book of minutes is not such a recording as makes the verdict fixed and unalterable, but until the jury are dismissed, their power over their verdict, and their right to alter it so as to make it conform to their real and unanimous intention and purpose remains. (*Warner* agt. *N. Y. C. R. R. Co.*, 52 *N. Y. R.*, 437.)

2. It is within the power of the legislature to make such changes in the law respecting the mode of procuring and empaneling a jury as it may deem expedient, limited only by the constitutional obligation to preserve the right of trial by an impartial jury. (*Stokes* agt. *People*, 53 *N. Y. R.*, 164.)

## Digest.

3. The act "in relation to challenges of jurors in criminal cases" (*chap. 475, Laws of 1872*), which provides in substance that an opinion or impression as to the circumstances or as to the guilt or innocence of the prisoner shall not be a sufficient ground of challenge for principal cause, provided the juror declares on oath that he can render an impartial verdict, and provided the court be satisfied that he does not entertain such a personal opinion as would influence his verdict, does not infringe upon the right to an impartial jury, and is constitutional. (*Id.*)

4. A sheriff has no right to summon talesmen to try an action to which he is a party. (*Howe* agt. *Brun- dage*, 1 *S. C. R.*, 429.)

## JUSTICE'S COURT.

1. At a trial before a justice of the peace, the verdict of the jury, in favor of plaintiff, was received by the justice and entered in the absence of the plaintiff. *Held*, that a judgment for plaintiff was erroneous and that the defendant could take advantage of the error. (*Board of Excise of Marion* agt. *Turk*, 2 *S. C. R.*, 367.)

## L.

## LACHES.

1. Action commenced by plaintiff's testatrix, to have a conveyance of land made to defendant's testator, declared a mortgage. Pending a reference, all of the original plaintiffs and two of the defendants died. An amended supplemental complaint was served April 15, 1872, to which an answer was served May 7, 1872. This answer set up the statute of limitations. The original referee having died,

the action was, by consent, again referred, and the trial commenced before the new referee. A motion was then made by the plaintiffs, to have that portion of the amended answer, which set up the statute of limitations, stricken out. *Held*, that the motion was properly denied, on the ground of laches, a year and nine months having elapsed after service of the answer before making the motion. (*Servoss* agt. *Wood*, 1 *Hun*, 314.)

## LANDLORD AND TENANT.

1. Where a tenant hires a house for a year from the first day of May, and is to pay the rent monthly in advance, and on the first day of February he abandons the premises for the alleged cause that they are untenable, and gives up the keys to the landlord, he is liable in any event for the rent of the month of February. (*McKellar* agt. *Sigler*, *ante*, 20.)

2. The landlord, in the latter part of March, having, by his previous acts, accepted possession, relet the premises to another tenant for thirteen months, claiming that for the month of April he relet on the tenant's account. *Held*, that there being no agreement in the lease giving the landlord authority to relet the premises on the tenant's account, he could not do so. (*Id.*)

3. Where the landlord, by his acts in making repairs, &c., takes possession of the premises after they have been abandoned by the tenant, he rescinds the agreement and terminates the relation of landlord and tenant, and thereby discharges the tenant from all liability to pay rent thereafter. (*Id.*)

See LIEN.

*Hale* agt. *Omaha Nat. Bank*, *ante*, 201.

## Digest.

See INJUNCTION.

*McDonald* agt. *James*, ante, 474.

See AGREEMENT.

*Hadley* agt. *Barton*, ante, 481.

4. In proceedings under the statute, relative to summary proceedings to recover the possession of land, against a tenant holding over, the summons, in certain cases, may be made returnable in less than three days; but when so returnable, it must be on the same day it issues. A summons returnable the next day after it is issued is void. (*People ex rel. Leary* agt. *Lane*, 2 S. C. R., 522.)

5. In a lease the lessee covenanted to keep the leased building in good repair and condition. At the time he took possession the roof and steps were in bad condition. The lessee made such repairs only as were required for his own comfort, and the steps became rotten and the roof leaked so as to injure the walls. After the lessee's term expired the lessor had the roof shingled, gutter repaired and new steps made. *Held*, that these were repairs within the covenant of the lease, and that the lessee was liable for the expense of making them. (*Green* agt. *Eden*, 2 S. C. R., 582.)

6. The respondent instituted proceedings, under the landlord and tenant act, to have the relator removed from a certain portion of a pier in New York, described in the complaint by metes and bounds. At the trial, there was no proof of any lease of the particular premises described. *Held*, that the variance was fatal. (*People* agt. *Cushman*, 1 Hun, 73.)

7. Where the relators, who were entitled to use a pier for loading and unloading canal boats, agreed to pay the respondent, the lessee of the pier, fifty dollars a month for the privilege of placing a derrick, scales and office upon a certain

portion thereof, *held*, that this did not create the relation of landlord and tenant, and that upon the termination of the agreement, they could not be dispossessed under the landlord and tenant act. (*Id.*)

8. In summary proceedings, it is proper to demand interest upon the rent. (*Id.*)

## LESSOR AND LESSEE.

1. By the terms of a lease the lessees were to pay the agreed rent by a note, falling due and to be paid at a specified time. *Held*, that the giving of the note did not discharge a surety for the lessees upon the lease, but that such surety remained liable until the note was paid. (*Woodbridge* agt. *Richardson*, 2 S. C. R., 418.)

## LEVY.

1. A levy upon the right, title and interest of the judgment debtor in goods, is, in law, equivalent to a levy upon the things themselves. It amounts to a seizure of the goods for the purpose of selling the whole or a qualified interest therein, and is sufficient to sustain an action of replevin. A judgment having been recovered against Thomas Waid, a son of the plaintiff, execution was issued thereon, and placed in the hands of defendant. M., one of his deputies, went to the house of the plaintiff, in his absence, and levied upon all the right, title and interest of the said Thomas, in certain property, and subsequently advertised the same for sale. Thomas had no right or interest, whatever, in the property. In an action of replevin, brought by the plaintiff, *held*, that he was entitled to recover. (*Waid* agt. *Gaylord*, 1 Hun, 607.)



## Digest.

## LIBEL.

*See MALICIOUS PROSECUTION.**Newfield agt. Copperman, ante, 87.*

1. An answer in an action for libel, denying that the article complained of was published by or with the knowledge, consent, assent or permission of defendant, is not frivolous. (FOLGER, *J.*, *dissenting.*) (*Samuels agt. E. M. Association, 52 N. Y. R., 625.*)

## LIEN.

1. Where a lease of hotel property contained an agreement, on the part of the lessees, that a lien should be given by them to the lessor on all furniture which should be placed in the hotel, contemplating the execution of a further instrument to create a lien, such covenant can be enforced in equity, and the lessees be obliged to give the security provided for, to secure the payment of the rent. (*Hale agt. Omaha Nat. Bank, ante, 201.*)
2. Where the assignee of the landlord, plaintiff, without having taken any steps to create the lien provided for in the lease, upon the property which had been placed in the hotel after the tenants had taken possession, subsequently took from them a chattel mortgage, covering the property in the hotel, to secure the sum of \$5,000, moneys loaned by him to them; and, after the defendant had, in an action, recovered possession of said property under a second chattel mortgage, given by the lessees to it, the plaintiff assigned his mortgage to defendant for a full consideration paid to him, and the defendant thereupon sold the property upon both mortgages, realizing barely sufficient to satisfy both mortgages. (*Id.*)

3. *Held*, that the evidence produced was insufficient to satisfy the court that, before the defendant took its mortgage, it had any knowledge of the provisions in the lease in plaintiff's favor, in respect of the lien to be given by the lessees to the landlord; and no such notice was given by the plaintiff on a sale of the property. (*Id.*)

4. In this action, brought by the plaintiff for a conversion of the property by the defendant, by means of which the plaintiff, as is alleged, is unable to enforce his lien, *held*, that the complaint be dismissed, with costs. (*Id.*)

## LIS PENDENS.

1. Where the affidavit of filing of notice of pendency of action is defective, but proper notice has, in fact, been duly filed, and no objection is made, by defendant's attorney, to the sufficiency of the proof, the judgment is not thereby rendered void; it is a mere irregularity, which may be disregarded or amended, under sections 173, 176 of the Code, in the absence of any injury to defendant. The notice of *lis pendens* is made by statute, constructive notice to persons, claiming under the defendants in the action, but not parties to it; as their rights only are affected, it is reasonable that they only should be allowed to take advantage of the omission to file it. (*White agt. Coulter, 1 Hun, 357.*)

## M.

## MALICIOUS PROSECUTION.

1. To sustain an action for *malicious prosecution* the gravamen of the charge must be that the plaintiff has been improperly made the subject of legal process to his damage. The form of the prosecution is

## Digest.

immaterial, but there must be a legal process of some kind to which the plaintiff was subjected and forced to submit. Where this element is missing, the action must fail. (*Newfield* agt. *Copperman*, ante, 87.)

2. A mere note or letter of a magistrate or officer requesting a person to call, is not a prosecution. (*Id.*)
3. Where the action was partially tried as one for malicious prosecution, but finally changed and submitted to the jury as an action of libel, on the ground that the complaint seemed to contain sufficient averments for that purpose, and the state of the proof seemed to call for such change: *Held*, on a review of the case and authorities upon this motion that this view of the case was erroneous, and the defendant was entitled to a new trial, with leave to plaintiff to amend his complaint. (*Id.*)
4. The true doctrine and principles of libel stated. (*Id.*)
5. In a case of malicious prosecution, the question of malice is of fact for the jury, and that of probable cause of law for the court. (*Van Voorhees* agt. *Leonard*, 1 S. C. R., 148.)

## MANDAMUS.

1. The relator having been, prior to the year 1870, duly appointed *crier* of the court of common pleas, New York, by that court, it became the duty of the supervisors, under section 39 of the Code, to fix his salary, which was done by a resolution of the supervisors of May 26, 1870, to take effect January 1, 1870, at \$2,500 per year, which resolution was duly approved by the mayor. (*People ex rel. Davin* agt. *Havemeyer*, ante, 59.)
2. Prior to the time when the resolution was passed, fixing the salary,

the relator had, for some time, drawn his pay as any ordinary officer of the court at \$1,200 per year. (*Id.*)

3. It having been urged by the corporation counsel, as the sole ground of objection to the mandamus, that the resolution of May 26, 1870, was invalid, because by section 7 of chapter 875 of the Laws of 1869 the supervisors were prohibited from increasing the salaries of those then in office or their successors, except as provided by acts of the legislature, and because the third section of chapter 382 of the Laws of 1870, passed April 26, 1870, contains a similar prohibition. (*Id.*)
4. *Held*, that the objection had no relevancy to this case. There was no increase, because the salary had not previously been established. (*Id.*)
5. A *mandamus* will not be issued against a judge, commanding him to settle a bill of exceptions in a particular manner, when, as to the manner, there is a dispute. (*Matter of Tweed*, ante, 162.)
6. The justice who presides at the trial must say whether or not an exception was taken, and his return is controlling until further proceedings. (*Id.*)
7. Where the board of supervisors purchase a right to use in the register's office a patented system of indexing the public records, which is a proper county charge, and which they can properly audit as such, they may also purchase and take an assignment of such patent, to secure the county forever from the risk of having to pay over again for the use of such invention, which is also a proper county charge, which they can audit, and which the county will be required to pay. (*People ex rel. Ford* agt. *Earle*, ante, 368.)

## Digest.

8. A variance between the declaratory and mandatory part of a writ of alternative mandamus is not fatal. It may be amended. (*People ex rel. Stockwell agt. Earle, ante, 370.*)
9. The plea of "no appropriation" is not properly interposed by the county auditor on a proceeding to compel him to audit a claim; that should be reserved for an application to compel its payment. (*Id.*)
10. The power given to the board of supervisors of New York to provide for the permanent location of an armory, by erecting the same, may be fairly construed to authorize the hiring of a building for that purpose for a term of years. (*Id.*)
11. The question of fraud may be raised and investigated whenever it is made to appear, and the audit of the board of supervisors is not conclusive on that point. But a general charge of fraud in the return to a writ of mandamus is insufficient; subject, however, to amendment by setting up specific acts of fraud. (*Id.*)
12. A legal claim against a county is not made so by its audit by the board of supervisors. What are and what are not county charges are settled by law, and when the board of supervisors determines the amount of the debt due from the county, resulting from services rendered or goods furnished, which relate to a county charge, their decision is conclusive, inasmuch as they act judicially. (*People ex rel. Tracy agt. Green, ante, 382.*)
13. Whether a claim is a county charge depends upon facts; and, in a proper case, they may be inquired into upon issues raised on an alternative mandamus issued for the payment of the claim. (*Id.*)
14. A *mandamus* will issue against the auditor, and also one against the comptroller of the city of New York, requiring them to audit the voucher and pay the amount thereof to the relator for services rendered by him for the county, as assistant janitor to the new county court-house, where his claim has been properly adjusted, audited and allowed by the board of supervisors, and it appears that there is an unpaid balance in the treasury appropriated for such expenses. (*People ex rel. Martin agt. Earle, ante, 458.*)
15. And it is no answer to the relator's claim, by these officers, to assert that the relator's name is not on the pay-rolls of the commissioners of the court-house for the time he claims pay. That is a matter with which they have nothing to do. The board of supervisors have attended to that duty. (*Id.*)
16. The duties of boards of supervisors, generally, and especially in the city and county of New York, in connection with the duties of auditor and comptroller, considered and discussed. (*Id.*)
17. A *peremptory mandamus* ordered requiring the mayor of the city of New York to countersign a warrant drawn by the comptroller of the city pursuant to section 7 of chapter 702 of the Laws of 1872, entitled "An act to improve and regulate the use of the Fourth avenue in the city of New York," notwithstanding the objections: (*People ex rel. N. Y. and Harlem R. Co. agt. Havemeyer, ante, 494.*)
18. *First.* That a mandamus was not the appropriate remedy: (*Id.*)
19. *Second.* That the certificate of the superintending engineer includes the cost of temporary tracks for running trains during the progress of the work, and sundry other items, which, though lawful and authorized by the statute of 1872, are not proper to be charged to the cost of the improvement, for



## Digest.

- one-half of which the city is liable: and (*Id.*)
20. *Third.* That the law is unconstitutional, for sundry reasons and on various grounds urged and stated upon the argument. (*Id.*)
21. Where the special term refuses to grant a peremptory mandamus, on the specific ground that the relators can maintain actions at law for the recovery of their demands, this court is not, by that determination, restricted to that reason, if any other is shown by the papers justifying the denial of this particular remedy. (*The People ex rel. Bagley agt. Green, 1 Hun, 1.*)
22. The remedy by mandamus is one of an exceptional character, appropriate only to that class of cases where a clear legal right may be made to appear, without any other adequate legal means to redress and maintain it. (*Id.*)
23. Where the fact upon which the right may depend is controverted, it must first be tried and determined, before a peremptory mandamus can be issued, and that determination is to be made, not upon conflicting affidavits, but upon an issue framed upon the alternative writ, and must be tried by a jury, according to the course of the common law. (*Id.*)
24. Although demands against corporate officers, or corporations themselves, may, under certain circumstances, be enforced by mandamus, where an action for damages may also be maintained in favor of the claimants, it cannot be done where an action can be maintained for the recovery of money claimed to be due and owing. (*Id.*)
25. Persons employed by commissioners, appointed to lay out and open streets in the city of New York, to act as clerks, prepare maps, etc., have no right of action against the city; their only remedy is against the commissioners employing them. (*The People ex rel. Purser agt. Green, 1 Hun, 86.*)
26. A mandamus having been ordered, requiring the National Trust Company to pay to the relator a certain sum out of a fund in its hands, the same was attempted to be issued without the seal of the court, and, in this form, was delivered to the secretary of the company. Another claimant upon the same fund, having obtained and subsequently served, in due form, a like mandamus, the same being duly sealed, the Trust Company paid, under the advice of counsel, the sum required by the second mandamus, leaving insufficient moneys in its hands to meet the full amount of the relator's claim. *Held*, that the service of a writ of mandamus, without a seal, is a nullity. *Held*, further, that the officers of the company, not having intended any contempt, but acting under legal advice, in pursuing what they thought their duty, may avail themselves of the merest technical objection in proceedings against them for contempt. (*People agt. Fisk, 1 Hun, 464.*)
27. A body composed of those who have associated themselves together as a church, for ecclesiastical purposes, has power to adopt its own rules for admission and discipline, and to administer them in its own way, and when, according to its rules and discipline a member is convicted of a moral delinquency and is expelled, the courts have no control in the matter, and a mandamus will not lie to reinstate the expelled member. (*People ex rel. agt. The G. U. E. Church, 53 N. Y. R., 103.*)
28. A religious corporation organized under the act of 1813, providing for the incorporation of religious societies (*chap. 60, Laws of 1813*), has no power to try a corporator

## Digest.

for a moral delinquency, or to disfranchise him in consequence thereof. (*Id.*)

29. The provision of the Revised Statutes (2 R. S., 587, § 57) providing that where issue is taken upon a return to a writ of alternative mandamus, in case a verdict shall be found for the relator he shall recover damages and costs in like manner as in an action, &c., and that a peremptory writ shall be granted to him without delay, does not entitle the relator to a peremptory writ where the record shows he has no legal right thereto. (*People ex rel. agt. Batchellor*, 53 N. Y. R., 128.)

30. At any time after a return and before a peremptory writ is granted, the defendant may object to a want of sufficient title in the relator to the relief sought, or show any other defect of substance, although he cannot after return object to defects in form. (*Id.*)

## MARRIED WOMEN.

1. A wife is not liable for the debt of her husband, although during his life, and also after his death, she made a verbal promise to pay the same. (*Lennox agt. Eldred*, 1 S. C. R., 140.)
2. A married woman cannot be imprisoned upon an execution issued upon a judgment for costs, in an action for slander, which she has failed to maintain. Such an execution can be levied and collected only out of her separate estate. (*Maloy agt. Dagnal*, 1 S. C. R., *Addenda*, 10.)

## MASTER AND SERVANT.

1. A servant may be discharged by the master for misconduct before the expiration of the time for

which he was hired, although the discharge is not made at the precise time of the misconduct, nor the grounds stated. (*Harrington agt. First National Bank*, 1 S. C. R., 361.)

## MECHANICS' LIEN.

1. Where there is no evidence at the trial to show that the defendant had an interest in the leasehold premises upon which a lien was claimed and judgment demanded, until after the contracts with the claimants were made, the defendant cannot be made liable. (*De Ronde agt. Olmsted*, *ante*, 175.)

## MOHAWK RIVER.

1. The Mohawk river is a navigable stream, and the title to the bed of the river is in the people of the state. Riparian owners along the stream are not entitled to damages for any diversion or use of the waters of the Mohawk by the state. (*Crill agt. City of Rome*, *ante*, 398.)
2. Although the law has been settled that the people of the state are proprietors of the waters of the Mohawk river, having the title thereto, the same are not necessarily to be used by them exclusively for purposes of navigation. (*Id.*)
3. The city of Rome was expressly authorized to construct "water-works," and supply the city with water, by an act of the legislature, passed April 24, 1872 (*Laws 1872*, ch. 352). (*Id.*)
4. The plaintiff, having a mill privilege in the city of Rome, supplied by water taken by means of a dam and an artificial channel from the Mohawk river, brought an action to restrain the city from taking

## Digest.

the waters of the Mohawk river at a point called the Ridge, for the purpose of supplying the city with pure and wholesome water, in pursuance of said act. (*Id.*)

5. *Held*, that if the plaintiff was not the owner of the waters of the Mohawk river, nor entitled, as a matter of right, to their use at the time the defendant began to divert them, then he has no foundation for the action. (*Id.*)

6. Plaintiff claimed that when the act of 1872 was passed, authorizing the defendant to take the waters of the Mohawk, the people could not have maintained an action for the use thereof under section 75 of the Code, which declares that the people will not sue for or in respect to any real property, unless within forty years the people shall have received the rents and profits of such real property, or some part thereof. (*Id.*)

7. *Held*, that certainly it could not be maintained that the state, since its purchase of the Inland Lock Company, in 1792, and the construction of the Erie canal of 1817, had not used the waters of the Mohawk river, or "some part thereof." The evidence establishes such use at the city of Rome, and at many other points along the river. Complaint dismissed. (*Id.*)

## MOTIONS AND ORDERS.

1. Where a question arises as to whether a pleading has been made and served according to the law and the practice of the court, so as to become a part of the pleadings in the case, the proper practice is to present the question for determination by motion to strike it out in case it has been served, or to compel its acceptance in case of a refusal to receive it. (*Fred-*

*ericks* agt. *Taylor*, 52 N. Y. R., 596.)

2. It is not within the discretion of the court, instead of determining such question when presented upon motion, to compel the parties to take or to await further proceedings in the case, at the peril of having them set aside in the former case, or, in the latter, of permitting a final judgment to stand. (*Id.*)

3. The right of a party to have such question determined upon motion, and the appealability of an order made thereon, is not affected by the fact the court has a discretion to impose terms upon granting or denying the motion. (*Id.*)

4. Accordingly, *held*, that an order of general term, affirming an order of special term denying a motion to strike out an unverified answer to a verified complaint, was appealable to this court. (*Id.*)

5. The supreme court has jurisdiction and full control over its own process, and may set aside an execution against the person, issued upon a judgment therein, after an arrest and imprisonment of the judgment debtor under and by virtue of the execution. Although by such arrest and imprisonment the execution is completely executed, yet it is not annulled. The writ is still the authority justifying the detention of the prisoner, and an order setting it aside takes away that authority and obligates his release. (*Pinckney* agt. *Hegeman*, 53 N. Y. R., 31.)

6. Such an order, valid upon its face, is a justification to the sheriff for the release. (*Id.*)

7. A refusal to grant relief upon a summary application is not ordinarily a final adjudication of the merits of the controversy. It will bar another summary application unless leave is given to renew,



## Digest.

but will not affect any other remedy. A provision, therefore, in an order denying relief upon such an application, which assumes to limit the rights of the parties to bring an action for relief either by prescribing terms or limiting the time for the commencement of such an action is erroneous. (*Howell agt. Mills*, 53 N. Y. R., 322.)

8. A motion to set aside a report of a referee, on the ground of improper conduct on his part, is addressed to the discretion of the court. The action of the special term may be reviewed by the general term, but the right of appeal there ends. (*Gray agt. Fisk*, 53 N. Y. R., 630.)

## N.

## NEGLIGENCE.

1. It is now the settled law that mere negligence, however gross, is not sufficient to deprive a party of the character of a *bona fide holder*. There must be proof of bad faith—that alone will deprive him of that character. (*Chapman agt. Rose*, ante, 13.)
2. Where the evidence on the trial tended very strongly to show that the signature of the defendant to the note sued upon, was obtained from him through a very gross and fraudulent imposition perpetrated upon him by one M.; that when he signed it he supposed he was signing a duplicate order for a hay-fork and two grappling pulleys, for which he had engaged to pay, and was signed as such without examination or reading it, upon the statement of M., with whom he was dealing, that such was its character. (*Id.*)
3. *Held*, there does not appear to have been any physical obstacle to the defendant's reading the paper before he signed it. He understood that he was signing a

paper by which he was about to incur an obligation of some sort, and he abstained from reading it; and having signed an obligation without ascertaining its character and extent, which he had the means of doing, upon the representation of another, he put confidence in that person, and if injury ensued to an innocent third person, by reason of that confidence, his act was the means of the injury and he must answer for it. (*Id.*)

4. In an action brought under the statute for the negligent killing of plaintiff's intestate while a passenger on defendant's road, the evidence showed conclusively that there was no negligence or want of proper care, on the part of the defendant, in the management of their road or in running their cars at the time of the accident, but the evidence was clear and convincing to establish the fact that the *misplacement of the switch* which caused the accident by which the death ensued, was done by some evil-disposed person, not connected with the road, shortly preceding the arrival of the train in the night-time. (*Keeley agt. Erie Railway Co.*, ante, 256.)
5. *Held*, that the plaintiff's *nonsuit* at the circuit, upon such evidence, was clearly correct. (*Id.*)

## NEW TRIAL.

1. When a new trial is granted upon the judge's minutes, it must be considered as granted upon all the proceedings of the trial, including all the testimony and the charge of the judge; and when the case on appeal does not profess to contain the whole evidence, and gives only a portion of the judge's charge, the appellate court cannot say that the granting of a new trial was error. (*Boyer agt. Brown*, 1 Hun., 615.)

## Digest.

2. An erroneous denial of a motion to dismiss the complaint of one of several joint plaintiffs, who has shown no cause of action, is not a ground for a new trial. The general term has power and should correct the error by making the order asked for upon the trial, and if there was no other error should sustain the judgment in favor of the other plaintiffs. (*Sinar* agt. *Canaday*, 53 N. Y. R., 298.)
4. In an action for damages for the overflow of a mill-pond it was shown that defendant, the owner of the pond, was not in possession, having leased the same to a third party. *Held*, that the owner of the premises overflowed could not recover for such overflow, without showing that defendant had notice or knowledge of the existence of the same before the action was brought. (*Miller* agt. *Church*, 2 S. C. R., 259.)

## NUISANCE.

1. Plaintiffs are the owners of improved lands, which they have been engaged in beautifying since 1857. Defendant is the owner of a brick-yard adjoining, upon which he burned brick by the use of mineral coal as a fuel, and in so doing sulphurous acid gas, which is poisonous to vegetation, was generated in quantities. When the south wind blew while the kilns were burning, this gas was carried upon the plaintiffs' land, and it had, by repeated attacks, destroyed many of their ornamental trees. Defendant's premises had been in use as a brick-yard, though not uninterruptedly, since before plaintiffs purchased their land, and for more than twenty-five years. *Held*, that plaintiffs were entitled to an injunction to restrain the defendant from using mineral coal in his process of burning brick. The maxim *sic utere tuo ut alienum non laedas* construed. (*Campbell* agt. *Seaman*, 2 S. C. R., 231.)
2. A right to commit a legal nuisance cannot be acquired by prescription. (*Id.*)
3. In an action for nuisance it is sufficient to show that the premises affected cannot be enjoyed without danger to health, or that their value is substantially impaired by the nuisance. (*Id.*)

## O.

## OFFSET.

1. In an action by an executrix to foreclose a mortgage for moneys which became due after the death of the testator, the defendant cannot offset any debt due from the testator to him, although the offset existed at the time of the testator's death. (*Patterson* agt. *Patterson*, ante, 242.)

## ORDER.

1. This action was tried before a jury, and a verdict rendered for plaintiffs. Defendants appealed to the general term, and a case was settled and served. The general term reversed the judgment and ordered a new trial upon a specific objection. After the entry and service of the order of reversal, plaintiffs obtained an order from Mr. Justice DANIELS, allowing them to apply for a resettlement of the case, by striking out this exception, and an order striking it out was subsequently made by Mr. Justice VAN BRUNT, from which order an appeal was taken to the general term, where it was affirmed by default. Subsequently, a motion was made to have the orders of justices DANIELS and VAN BRUNT vacated, which was denied. *Held*, that this was proper;

## Digest.

that, to grant the motion, would be to allow one justice at special term to reverse and vacate the order of another justice at special term; that no such practice exists, nor is there any provision of the Code which permits it. (*Hallgarten* agt. *Eckert*, 1 *Hun*, 117.)

## ORDER OF ARREST.

1. An order of arrest may be granted by a county judge, though the action in which it is granted is not triable in his county, and though the attorney for the moving party does not reside therein. (*Kennedy* agt. *Simmons*, 1 *Hun*, 630.)

## P.

## PARENT AND CHILD.

1. Where a father places his daughter, thirteen years of age, there to remain, under the care of a woman of notorious character living in a house opposite his own dwelling, and of whose reputation he could have advised himself without trouble, his conduct justifies the presumption that he is indifferent as to the destination and employment of his child, and unfit to be trusted with her care and maintenance. (*Matter of Clifton*, *ante*, 172.)
2. The law of the land is broad enough to protect children from the errors of delinquent parents, and will not fail, through its officers, to endeavor to prevent the injustice which would otherwise ensue. When a parent is derelict he becomes unworthy of the charge; his trust is forfeited and the law assumes it. (*Id.*)
3. In this case the application of the father was denied, and the child

ordered to be placed in the institution, "The Sheltering Arms," there to remain until the further order of the court. (*Id.*)

## PARTIES.

1. A grantee who has parted with his title to the property in question, and who claims no interest in it, is neither a necessary nor a proper party defendant in an action by a judgment creditor to vacate the title and recover the property. (*Taft* agt. *Wright*, *ante*, 1.)
2. Only parties in interest are now recognized. A referee having found in favor of plaintiff against two of the defendants, and dismissed the complaint as to the third defendant Hill, as not a party in interest, the general term affirms said dismissal, and reverses the judgment as to said two other defendants. (*Id.*)

## See DIVORCE.

*Watson* agt. *Watson*, *ante*, 240.

## See EXAMINATION OF PARTIES.

*Knoepfel* agt. *Kings County Fire Ins. Co.*, *ante*, 412.

3. It is not sufficient that the party who is the representative be a party to the suit, but he must be made a party distinctly in his representative character. (*Fisher* agt. *Hubbell*, 1 *S. C. R.*, 97.)
4. The defendant's intestate executed a bond conditioned for the payment of \$400 to the heirs of J. J. L., &c., their assigns, agents, &c., upon the death of their mother. The plaintiff, who was one of the payees, sued separately for one-eighth of the \$400, and set up that there were eight heirs, that several of the heirs had been paid, and that defendant, who was intestate's administrator, had sep-



## Digest.

- arately promised to pay her. *Held*, that plaintiff could maintain a separate suit on the bond, and need not join the other payees as parties. *Held*, also, that the objection of a non-joinder could be taken only by demurrer. (*Hees* agt. *Nellis*, 1 S. C. R., 118.)
5. In an action upon the debt of a married woman, contracted before marriage, her husband may be joined with her. (*Lennox* agt. *Eldred*, 1 S. C. R., 140.)
6. In an action, brought as a substitute for a *scire facias*, to revive a judgment against a deceased debtor, *held*, that the heir at law of the judgment debtor, and the administrator of his estate, could not be joined as defendants. (*Strong* agt. *Lee*, 2 S. C. R., 441.)
7. It is the right of a party to a contract, in an action upon it, to pursue the real principals with whom he contracted; and the fact that some of them do not appear in, and that their interest is not disclosed by the contract, does not prevent him from showing that they were jointly interested therein. (*Wylde* agt. *N. R. R. Co.*, 53 N. Y. R., 156.)
8. A misjoinder of parties-plaintiff is not a ground for dismissal of the complaint as to all the plaintiffs, if either has shown that he has a good cause of action. In such case the motion must be for a dismissal of the complaint of the plaintiff, in whom no right of action appears. (*Simar* agt. *Canaday*, 53 N. Y. R., 298.)
9. Where one is induced by false representations to part with property in exchange for worthless securities, which he gives to another, the donor, and not the donee, can maintain an action for the fraud against the wrong-doer. (*Id.*)
10. The principle of courts of equity, that in cases of breach of trust, where no general rule or order of the court interferes, and where the facts of the case call for a contribution or a recovery over, that all persons who should be before the court to enable it to make complete and final judgment are necessary parties to the action, is not abrogated by the Code. (*Sherman* agt. *Parish*, 53 N. Y. R., 483.)
11. If, after timely objection of want of parties, the plaintiff does not bring them in, the complaint may, in the discretion of the court, be dismissed, but without prejudice to a new action. An unqualified judgment, dismissing complaint in such case for want of parties, is erroneous and is subject to review. (*Id.*)
12. The complaint should not be dismissed, even without prejudice, and plaintiff put to a new action, when the same end may be reached by allowing the cause to stand over, on such terms as are equitable, until the plaintiff bring in the necessary parties. (*Id.*)

## PARTITION.

1. A trustee having an interest in real estate which he holds in common with others, and having a power to sell such interest, may institute a partition suit to divide the estate. (*Galleo* agt. *Eagle*, 1 S. C. R., 124.)
2. The amount payable to a doweress, in lieu of dower, from the proceeds of a sale in partition, is regulated by the Revised Statutes, and not by Rule 85 of the supreme court. (*Banks* agt. *Banks*, 2 S. C. R., 483.)
3. The plaintiff brought this action, as heir-at-law of Abraham Wood, deceased, to obtain the partition of certain lands in the possession of

## Digest.

the defendants, who claimed them as devisees of said Wood. The plaintiff alleged that the devise was void, and brought this action in pursuance of chapter 238, Laws of 1853. A motion was made by the plaintiff, for an order directing the settlement of the issues in the action and that the same be tried by a jury. *Held*, that it was error for the special term to deny the motion. (*Hewlett agt. Wood, 1 Hun, 478.*)

## PARTNERSHIP.

1. The object of the statute in providing for the formation of limited partnerships was to compel those who claim the benefits of its exemptions to give public notice of the terms of the partnership, that all who deal with it may know the extent of the credit and liability which it assumes. (*Levy agt. Lock, ante, 394.*)
2. It was also intended for the mutual protection of the special partner and those dealing with him, and should be construed in the spirit with which it was framed. (*Id.*)
3. All that the law requires in the formation of a limited partnership is a substantial compliance with its provisions. The filing of the certificate and affidavit required, twenty-eight days after they were executed, could not affect the validity of the partnership as to those who dealt with it after the date of such filing. (*Id.*)
4. Where an agreement was made by a partnership firm with a third person, that in consideration of a loan made by the latter to the firm of a certain sum of money, for one year, the firm would pay such person one-third of the profits of their business to be settled half-yearly; and at the end of the year take him in as a partner, if the firm and he should feel satisfied, on his making further investments and putting in more capital. (*Leggett agt. Hyde, ante, 524.*)
5. *Held*, that by the agreement such person had a specific interest in the profits as profits, and became a partner as to the creditors of the firm and as to third persons. (*CHURCH, Ch. J., dissenting.*) (*Id.*)
6. Where a copartnership is dissolved and no agreement made between the parties in regard to the good-will, nor any restriction from going into the same business, or from using the former firm name, *Held*, that there was no reason why the defendant might not use the name of the old firm, where it properly designated also the name and style of his new firm as long as it existed. (*Lathrop agt. Lathrop, ante, 532.*)
7. Where the plaintiff sought to restrain, by injunction, the defendant, his former partner, from using the name of the old firm, "J. Lathrop & Co.," and also from the use of that name and style after the defendant had dissolved partnership with the new firm, and carried on business alone—the use of the words "& Co." being prohibited by statute. (*Id.*)
8. *Held*, that the plaintiff was not entitled to the injunction to restrain the defendant from using the name of the old firm, before the dissolution of the new firm, and if the defendant had made himself liable to the penalty prescribed by the statute of 1833 by using the words "& Co." contrary to the statute, he could be proceeded against by an appropriate action under that statute, but it gave no authority for this action. (*Id.*)
9. S., by contract in writing, agreed to work the farm of C. on shares, and to take a certain number of cows and keep them in a certain

## Digest.

manner. It was also verbally agreed that a ton of feed should be purchased for the cows and that each should pay for one-half thereof. S. bought the feed of plaintiff, acquainting him with the agreement. *Held*, that such an agreement did not render S. and C. partners in the purchase of the feed, and that each was severally liable only for one-half the purchase-price. (*Angell* agt. *Cook*, 2 S. C. R., 175.)

10. An action was brought in a justice's court against S. and C., jointly, for the price of the feed. Judgment was rendered in favor of plaintiff, which was affirmed by the county court, upon an appeal by C. *Held*, that the pleadings might be amended to meet the case (*Code*, section 64, *subd.* 11), the name of S. stricken out as an unnecessary party (*Code*, section 173), and the judgment affirmed against C., to the extent of one-half the amount rendered in the courts below. (*Id.*)

## PAYMENT.

1. Where M. held a note against W., which T. claimed as receiver, in hostility to M., the voluntary payment of the note by W. to M., before he was enjoined or sued by T., is valid, notwithstanding W. had prior notice of such claim, and that T. intended to contest the title of M. as having been transferred to him in fraud of the rights of the judgment creditors, unless impeached for actual fraud. (*Terry* agt. *Wait*, *ante*, 52.)
  2. As this suit was *in rem* to reach property in the hands of the defendants, it failed to be effectual, because the defendant, W., had paid the note in question to M. before the plaintiff had obtained an actual lien by the service of the injunction. (*Id.*)
  3. The defendant, M. never having been personally served with process, and having collected the note and taken the proceeds to Canada, he had no occasion to appear and submit to the jurisdiction of the courts of this state to try his title to said money. (*Id.*)
  4. His neglect to appear and answer therefore, could not be used as evidence against the defendant, W.; and to recover against him it was incumbent upon the plaintiff to prove the allegations of fraud by other evidence. (*Id.*)
  5. Assuming the note was paid by the defendant, W., before this suit was commenced, as found by the court below, he was an unnecessary party to this action. The plaintiff's only remedy was to pursue the fund in the hands of M. (*Id.*)
- See SALARIES.  
*Smith* agt. *Mayor, &c., of N. Y.*, *ante*, 277.
- 6 It has long been settled that a plea of the payment of a less sum than is admitted to be due, cannot be held good as an accord and satisfaction. (*Williams* agt. *Irvine*, *ante*, 440.)
  7. And the payment of a lesser sum than is admitted to be due does not preclude a recovery of the balance, though the payment is evidenced by a receipt expressing payment to be made in full of all demands. (*Id.*)
  8. But, if there has been a *bona fide* dispute between the parties as to their rights, and they agree upon a sum to be paid, and the same is paid, this will bind the parties; not, however, upon the principle of accord and satisfaction, but upon the principle that the parties have ascertained their rights and effected a settlement upon the basis of such rights. (*Id.*)



## Digest.

9. Where a promissory note was delivered by the defendants, note brokers, to the plaintiff who was also a note broker, for sale, and the plaintiff sold the note to a customer of his, all parties believing at the time that the drawers of it were solvent, when in fact they were then insolvent, and the purchaser on learning that fact immediately called upon the plaintiff with the note, and the latter received it back and returned to the purchaser the consideration paid for it. (*Stewart agt. Orvis, ante, 518.*)

10. *Held*, that the defendants were liable to the plaintiff for the amount of the note; for, in accepting a return of the note and repaying the money to the purchaser, the plaintiff did no more than the defendants, who had acted through him, were bound legally and in conscience to do—the plaintiff had succeeded to all the rights and remedies of the purchaser. (*Id.*)

11. A note was paid when it became due with the proceeds of another note, made and indorsed by all the parties to the first note. *Held*, that it was a continuing indebtedness; the debt secured by the first note was not paid, but merely transferred. (*Dunlap agt. Hawkins, 2 S. C. R., 292.*)

12. Plaintiff sold defendant a buggy, and took as part payment the notes of a third person, upon the representation of defendant that the maker of the notes was solvent and that if the notes were not paid, he (defendant) would pay them. *Held*, that the defendant was liable for the amount of the notes. (*Allen agt. Bantel, 2 S. C. R., 342.*)

13. Defendant's undertaking was evidence that the notes were not received as absolute payment; it was not necessary to be in writing, and plaintiff was entitled to commence action upon the non-pay-

ment of such notes at maturity, without an attempt to collect them of the maker. (*Id.*)

## PERPETUATING TESTIMONY.

1. Under the Revised Statutes, article 5, title 3, chapter 7, part 3, a party to an action has not an absolute right to examine any witness under this statute at any time before or after issue joined. (*Cheever agt. Saratoga County Bank, ante, 376.*)

2 The object of the statute is to *perpetuate* the testimony of a witness, whose evidence is material, and from age, non-residence or infirmity the party is in danger of losing if not perpetuated under this statute. (*Id.*)

3. The proceeding under this statute must be taken in entire good faith. And where it is intended to include in the examination more than one witness, the judge before whom the examination is to take place will, in his discretion, determine which are to be examined and which not. (*Id.*)

## PLACE OF TRIAL.

1. Where there is a demurrer to the whole complaint, the issue of law thereon must be tried in the county designated in the complaint. It cannot be tried as a mere motion at any special term in the judicial district. (*Christy agt. Kiersted, ante, 467.*)

2. The court may change the place of trial, when the county designated in the complaint is not the proper county; and this irrespective of issues, whether of law or of fact. If changed, the trial must be had in the county to which it is changed. If not changed, the trial must be had in the county designated in the complaint. (*Id.*)

## Digest.

3. The act of 1873, chapter 139, Session Laws, 1873, page 237, provides that "while said Fall Brook Coal Company shall have an office and place of business in this state, they may sue and be sued the same as if they were a corporation of the state of New York, and for that purpose shall be deemed a resident corporation of this state." (*Fall Brook Coal Co. agt. Lynch, ante, 520.*)
4. The plaintiff being a corporation organized under the laws of the state of Pennsylvania, brought this action against the defendant, a resident of the county of Onondaga in this state, and laid the venue in the county of Schuyler, in this state, where it kept an office and place of business. The defendant duly made a demand that the place of trial be changed to the county of Onondaga, which was refused, and thereupon the defendant moved to thus change the place of trial. (*Id.*)
5. *Held*, that although the subject of the bill is not expressed in the title, the act cannot be regarded as "private or local," within the meaning of the constitution, and is therefore not unconstitutional. (*Id.*)
6. The plaintiff having in all things complied with the provisions of said act relating to its keeping an office and place of business within the county of Schuyler, the motion must be denied. (*Id.*)
2. Where *case* and *assumpsit* were at common law concurrent remedies, the form of the action that the pleaders elected was determined by the insertion or omission of the allegation that the defendant "undertook and promised." The right of selection remains, and, whether the action is in *tort* or *assumpsit*, must be determined by the same criterion. (*Id.*)
3. In an action to recover the value of personal property, claimed to be wrongfully converted, the complaint set forth that the property was leased to one S., with the condition that if plaintiff should at any time deem himself unsafe, or the property not well *taken care of*, he might take possession of it; that the defendant had, as United States marshal, seized the property under a bankruptcy warrant against the property of S., and that plaintiff demanded the property of defendant on the grounds that he deemed himself unsafe, and the property not well taken care of, which demand was refused, &c. The fact that plaintiff did deem himself unsafe, and the property not well cared for, was not alleged. *Held*, that a demurrer would lie, on the ground that there were not sufficient facts to constitute a cause of action, there being no averment of plaintiff's right to the property at the time the suit was brought. (*Hathaway agt. Quimby, 1 S. C. R., 386.*)

## PLEADING

1. The plaintiff brought action for damages arising from the satisfaction by defendant of a judgment that had been previously sold and assigned to plaintiff. The complaint contained two counts. The first set forth the acts of the defendant, and simply claimed that thereby the judgment was



## Digest.

4. A complaint, in an action brought on behalf of a county to recover moneys paid defendant, charged the defendant with presenting claims against the county for services not rendered to the county, or for which it could legally be charged and further set forth that the defendant knew that the claims, were not legal, and fraudulently procured a warrant for the payment of the same from the board of supervisors. *Held*, that the complaint stated facts sufficient to constitute a cause of action. (*Supervisors of Richmond County agt. Frean*, 1 S. C. R., 431.)
5. Defendant took a conveyance of real estate and assumed the payment of a mortgage thereon. Afterward he conveyed to another who also assumed payment of the mortgage. In an action upon the bond secured by such mortgage defendant, in his answer, set up that the holder of the mortgage had, by agreement with defendant's grantee and without defendant's consent, extended the time of payment thereof. It did not appear whether the time of extension had expired or not. *Held*, per BRADY, J., that defendant did not stand in the relation of surety but was a principal debtor, and the extension set up as a defense was frivolous, and per INGRAHAM, P. J., that the answer was irrelevant. *Held*, BARRETT, J., *dissentiente*, that the answer was not irrelevant. (*Perkins agt. Squier*, 1 S. C. R., 620.)
6. Where the propriety of setting up a counter-claim first appeared upon a trial before a referee, *held*, that the defendant might, after the trial was suspended by an order staying proceedings, apply to the special term, on motion, and obtain an order permitting him to amend his answer by setting up that defense. (*Mitchell agt. Bunn*, 2 S. C. R., 436.)
7. A complaint, in an action for divorce, alleged that the plaintiff was an inhabitant of this state, and had been so from the 10th of September, 1872, and then charged the defendant with acts of adultery committed between the 1st of January, 1870 and 1873. *Held*, that the averment was sufficient to constitute a proper cause of action for the consideration and action of the court, under the act of 1862 (*Laws of 1862, chapter 246, section 1*), and that conferred jurisdiction over the subject-matter of the action (*Von Rhade agt. Von Rhade*, 2 S. C. R., 491.)
8. In an action against a married woman, as indorser of a note, the answer put in issue the demand of payment and notice of non-payment, and averred that her indorsement was procured while under duress. *Held*, that the answer was not frivolous. (*Klots agt. Fincke*, 2 S. C. R., 580.)
9. The complaint contained a claim for moneys arising from the sale of plaintiff's property by defendant, which moneys were applied by defendant to his own use; and also a claim for moneys due upon an express contract. The first named claim was set forth as arising upon contract. *Held*, that the conversion of the moneys raised an implied promise to repay, and that the claim therefor was properly admitted to counterbalance a counter-claim of defendants. (*Leach agt. Leach*, 2 S. C. R., 657.)
10. In an action to annul a marriage between plaintiff and defendant, upon the ground that plaintiff had been previously married, and his wife was living at the time of his marriage with defendant, but had not been heard from by him, for more than five years; *held*, that it was no defense that defendant was induced to marry plaintiff by his representations that he had the legal right to contract marriage. (*Price agt. Price*, 2 S. C. R., 659.)



## Digest.

11. It is a proper matter of defense that the former wife was not living at the time of the bringing of the action. (*Id.*)
12. An allegation in the answer that defendant "has not knowledge or information sufficient to form a belief whether S. (the first wife) was living at the commencement of this action," *held*, a material allegation to join issue upon plaintiff's statement that "she is still living." (*Id.*)
13. In the complaint, it was alleged that defendant had knowledge and information of the fact that plaintiff's former wife was living. *Held*, that a denial in the answer of this allegation, though not a perfect defense, was material, and might be necessary, upon the question of costs and alimony. (*Id.*)
14. The court has power, on special motion made on notice, to allow a supplemental and amended complaint to be served after a new trial ordered by the court of appeals; the facts still remaining essentially the same as alleged in the original complaint, though more minutely and particularly stated and the parties-plaintiff being changed in conformity with a transfer of the interests of the original parties. That the demand for judgment differs very materially, in the amended complaint, from that in the original, is not important, as any relief consistent with the facts may be given under section 275 of the Code. (*Getty* agt. *Spaulding*, 1 *Hun*, 115.)
15. The action was brought to recover the price of the goods sold. The answer consisted of a general denial. *Held*, that the defendant could not introduce evidence to prove that he had paid the broker for the goods. (*Bassett* agt. *Lederer*, 1 *Hun*, 274.)
16. When a case has been long pending, and is on the second trial before a referee, and when the evidence given on the preceding trial subjects the affidavit, made in support of the application for leave to amend the answer to grave suspicions as to the correctness of its statements, the court will consider such circumstances on such an application. Whether an amendment to a pleading should be allowed or not, has been confided, by the provisions of the Code, very much to the discretion of the court hearing the motion. And, ordinarily the exercise of that discretion is not afterward the subject of review by the general term, upon appeal. (*Smith* agt. *Bodine*, 1 *Hun*, 309.)
17. In an action upon two promissory notes, defendant's answer alleged in substance that the notes were given in part payment of a farm sold by plaintiff's testator to defendant; that defendant was induced to purchase by means of false and fraudulent representations as to the territorial extent of the farm; that the territory falsely represented to be embraced in the farm would have enhanced its value more than \$5,000, and that defendant had sustained damages to that amount. No reply was interposed. Upon trial defendant moved for judgment on the pleadings. No objection was made of want of proof of damages. The motion was denied, and judgment directed for plaintiff. *Held*, error; that the answer set up matter constituting a counter-claim, which was admitted by the failure to reply. That no objection having been made, and the court not having placed its decision upon the ground of want of proof of damages, it must be deemed to have decided that the answer did not set forth a counter-claim. (*CHURCH, Ch. J., dissenting.*) (*Isham* agt. *Davidson*, 52 *N. Y. R.*, 237.)
18. In an action to recover the purchase-price of a quantity of barley, the answer alleged that plaintiff

## Digest.

- represented it to be good, first quality, merchantable barley, and that defendant's agent, who made the purchase, relied upon this representation; that the barley was not merchantable, which fact was known to plaintiff. *Held*, that this answer did not raise an issue of fraud, as it omitted two essential elements to constitute fraud, *i. e.*, that plaintiff made the representation with intent to defraud, and that defendants or their agent were deceived by it. (*Lefler* agt. *Field*, 52 *N. Y. R.*, 621.)
19. An answer in an action for libel, denying that the article complained of was published by or with the knowledge, consent, assent or permission of defendant, is not frivolous. (*FOLGER, J., dissenting.*) (*Samuels* agt. *E. M. Association*, 52 *N. Y. R.*, 625.)
20. Where the summons in an action is for money, and the complaint sets forth facts which make out a cause of action, *ex contractu*, the presence of averments of fraud in the complaint does not make the action one *ex delicto*. (*Ledwith* agt. *McKim*, 53 *N. Y. R.*, 307.)
21. In an action upon contract against a married woman, a general complaint against a *feme sole* is proper. If the contract is not one she is authorized to make, the objection should be taken by answer. (*Frecking* agt. *Rolland*, 53 *N. Y. R.*, 423.)
22. The word "answer," as used in section 247 of the Code, means an entire answer as a distinct pleading, and not one or more of several defenses constituting it, and the remedy given by said section for a frivolous pleading (*i. e.*, a summary application for judgment) is only available when the pleading as a whole is frivolous. (*Strong* agt. *Sprout*, 53 *N. Y. R.*, 497.)
23. The court has no power, under that section, to order judgment upon a part of an answer which may be frivolous, where a part is held good, and there are issues remaining to be tried. (*Id.*)
24. A demurrer must distinctly specify the grounds of objection (*Code*, § 145), and unless it does so specify it will be disregarded. (*People ex rel. agt. Crooks*, 53 *N. Y. R.*, 648.)
25. Where, therefore, a complaint is demurred to solely on the ground that it does not state facts sufficient to constitute a cause of action, an objection that the plaintiff has not a legal capacity to sue will not be considered. (*Id.*)
26. A misjoinder of parties-plaintiff is not a ground of demurrer. (*Id.*)

## POWER OF ATTORNEY.

1. Where an answer sets up a power of attorney authorizing the attorney to do and perform all necessary acts in and about the management of the business of the principal as an importer of wines and liquors, with full power and authority in the premises, followed by an averment that the principal left the attorney in full and complete charge and control of his business, with directions to continue and carry on the same during the principal's absence. (*Reid* agt. *Bank of N. Y. Nat. Banking Association*, *ante*, 358.)
2. *Held*, that this fact, if proved, showed an intention to confer something more than a mere naked power upon the attorney. He could make and thus be compelled to meet business engagements. There being no fraud or mismanagement on his part, he should be protected for acts done in good faith and without knowledge of the revocation of the authority (by death) under which he acted. (*Id.*)



## Digest.

## PRACTICE.

1. The defendant, in his notice of appeal from the judgment of a justice of the peace upon the law, assigned, as grounds of appeal, that the evidence was incompetent, did not support the judgment, that on it the plaintiff was not entitled to recover, and that the judgment was contrary to law, but did not point out specifically any errors. *Held*, not sufficient to sustain an appeal. (*Delong* agt. *Brainard*, 1 S. C. R., 1.)
2. An appellant cannot, on appeal from a justices' court on the law only, insist upon any error not specified in the notice of appeal. (*Id.*)
3. That plaintiff was a non-resident of the state, the defendant a foreign corporation, and the cause of action did not arise in this state, was matter in abatement merely, and was waived by appearing and pleading in bar. (*Root* agt. *Great Western Railway Co.*, 1 S. C. R., 10.)
4. Defendant sold some oil land to three persons. The land was to be conveyed to J. P. D., one of the persons, to be held by him for the benefit of the three. It was claimed by the purchasers that defendant had misled and deceived them in the sale. J. P. D. released his claim for damages from such deceit, and the other two assigned their claims to plaintiff, who brought action against defendant, without adjoining J. P. D. Plaintiff, in the first count of the complaint, claimed damages for fraud and deceit in the sale; in the second count that there was an implied covenant of title which was broken, and in the third and fourth, that defendant was indebted to him for moneys had and received, "as above stated," from the purchasers who had assigned their claims. The complaint further stated that all the causes of action arose out of the same transaction. *Held*, that J. P. D. having released his claim arising from defendant's fraud, the other two injured parties or their assignee could maintain an action for their damages. *Held*, also, that the first count contained a cause of action, the second did not, and the third and fourth were for moneys had, &c., by means of false representations, and that a demurrer would not lie to the complaint for improper joinder of causes of action. (*Woodbury* agt. *Delap*, 1 S. C. R., 20.)
5. In an action to compel the delivery of a deed and of the possession of a house, the court below decided that plaintiffs were not entitled to the relief sought for, but were to compensation, and ordered that they have leave to move for a reference to ascertain the amount, and no final judgment was ordered. *Held*, that the practice of the plaintiffs in making a case, and moving for a new trial, at a general term, is authorized by section 268 of the Code (as amended in 1867). (*Stanton* agt. *Miller*, 1 S. C. R., 23.)
6. In an action for legal services a portion of the claim had been assigned to one of the plaintiffs. The answer denied indebtedness and set up payment. At the trial the performance of the services and the assignment were not disputed, but no direct evidence was given of those facts. The defendant did not object to the want of such proof. *Held*, that the objection was waived and could not be raised in the first instance at the general term. (*Chace* agt. *Higgins*, 1 S. C. R., 229.)
7. Upon an appeal to the general term from a judgment in favor of the plaintiffs therein for the possession of real property, defendant gave an undertaking according to sections 334 and 338 of Code, but gave none to pay costs of judgment appealed from amounting



## Digest.

to \$238.31. The general term affirmed the judgment with costs of appeal. The defendant appealed to the court of appeals, giving an insufficient undertaking. Said plaintiffs brought action on the first undertaking for the general term costs and \$50, value of use of premises in suit, as fixed by a supreme court justice. Afterward, on the application of defendant, a justice fixed the value of the use of the premises "from the time of the appeal until the delivery of possession at \$450." After this, by leave of court, the defendant filed and served a new undertaking in the last appeal "as of the time when the notice of appeal was served," which undertaking was in compliance with said sections 134 and 138. Thereupon the action on the undertaking given on the first appeal was discontinued. The costs on appeal to general term and the \$50 value of use, &c., were paid by defendant. The court of appeals affirmed the judgment. In an action upon the undertaking last given, *held*, that the judgment for costs of trial, &c., for \$238.31, as well as those of appeal, were included in and covered by such undertaking. The affirmance of the judgment by the court of appeals was an affirmance of the entire judgment and included such costs. That the \$50 for value of use, &c., could not be applied toward the \$450. The order fixing this last sum was for the use of the premises during the appeal to the court of appeals. (*Shankland agt. Hamilton*, 1 S. C. R., 239.)

8. In an action against R. and K., R. put in an answer and K. made default. Judgment was rendered making R. first liable and K. after him. R. appealed, not serving any notice of appeal on K., and the judgment as to R. was reversed and he released from liability. After the judgment of reversal plaintiff issued his execution against K. In a motion by K., to

set aside the execution on the ground that he was, by the original judgment, not liable until after R. and was not bound by the appeal, not being a party thereto, *held* (BOARDMAN, J., *contra*), that K. not having put in an answer, was not a party to the question of R.'s prior liability, and could not litigate it. He was not, in the sense of the Code, section 325, a "party aggrieved," or in that of section 327 an "adverse party." He could not himself appeal, and was not a necessary party to an appeal upon the issue between R. and the plaintiff. (*Garnsey agt. Knights*, 1 S. C. R., 259.)

9. In an appeal from a judgment entered upon the report of a referee, the appellant served a case for argument, containing an introductory statement of the proceedings in the cause, the notice of appeal, the judgment record containing the referee's report and the exceptions filed thereto, but not containing the evidence. *Held*, that the practice of the appellant was correct, and a motion to strike out the exceptions and introductory statement in the case was denied. (*Davie agt. Van Wie*, 1 S. C. R., 530.)
10. Plaintiff and a number of others associated together for the purpose of operating in the stock of a railroad company. They appointed four of their number as managers, who were to buy and carry the stock until a specified time, when the stock was to be divided among the associates in specified proportions. The associates were to furnish the means in certain agreed proportions, and were to share the profits or losses in like proportions; the managers were to take title to the stock in their own names, and were to engage in certain transactions in respect to the stock for the mutual benefit of all, but were not to deal in the stock of the company in question upon their own individual ac-

## Digest.

count. At the time designated for terminating the agreement the managers represented that they had on hand a certain number of shares of the stock, which had cost a specified sum, and demanded of plaintiff and other associates that they should respectively take up and pay for their ratable proportion of shares, which demand was complied with by plaintiff. Plaintiff brought action against the managers and the other associates, setting forth, in his complaint, the foregoing facts, and alleging that the managers had violated their agreement not individually to deal in the stock, had improperly managed their trust, made improper charges and had not properly accounted; that upon a proper accounting between the managers and the associates, and between the associates themselves, a large sum of money would be found due the plaintiff, and prayed that an accounting be had from the managers, and between the associates. *Held* (INGRAHAM, P. J., *dissenting*), that plaintiff's right to an account was upon the facts stated against the managers alone. An adjustment having been made between the managers and plaintiff, and, presumptively, the rest of the associates, he cannot elect for the other associates to undo that adjustment merely because he is dissatisfied, and a demurrer to the complaint, upon the ground of an improper joinder of the associates with the managers, as defendants, should be sustained. (*Boody* agt. *Drew*, 2 S. C. R., 69.)

11. Plaintiff, a woman, commenced an action and afterward married. The action was referred after issue was joined, and in the order of reference it was provided that the changed name of the plaintiff might be entered, without motion. At the trial before the referee, the defendant objected to proceeding on the ground of plaintiff's marriage. The order of reference was

produced and the proceedings continued in the cause, as originally entitled. Subsequently, an *ex parte* order was entered by the clerk, under the direction of plaintiff's attorney, substituting plaintiff's name after for her name before marriage. *Held*, that under section 121 of the Code, there was no abatement of the action by reason of marriage of the plaintiff, until it should be so ordered by the court, and no such order having been obtained the proceedings after the marriage were regular. (*Mapes* agt. *Snyder*, 2 S. C. R., 318.)

12. When exceptions are ordered to be heard in the first instance, at general term, the party moving for a new trial is confined to the exceptions taken at the trial, and also loses his right of review upon the evidence embraced in the case. (*Siegel* agt. *Schantz*, 2 S. C. R., 353.)

13. Where exceptions are ordered to be heard, in the first instance, at the general term, nothing can be passed upon but the exceptions themselves. (*Sheaf* agt. *U. & B' R. R. Co.*, 2 S. C. R., 388.)

14. An affidavit for obtaining an order for publication, which states that the defendant cannot be found within the state, although due search has been made for him, and that he is a resident of Berlin, Prussia, fails to comply with the requirements of the Code (section 135) if it does not show what efforts have been made to find the defendant. But the defect will not deprive the justice of the power to make the order. (*Von Rhade* agt. *Von Rhade*, 2 S. C. R., 491.)

15. An order for publication directed that the summons in the action should be published, and the copy summons, recited in the published order as being annexed, was not the summons which the order



## Digest.

- required to be published, but one requiring the defendant to appear and answer in six instead of twenty days. *Held*, that the fact that the order recited that a copy of the summons was annexed, when in fact it was not, in no manner qualified the direction or rendered it invalid. (*Id.*)
16. An order for service by mail required copies of the summons and complaint to be directed to the defendant at his place of residence, "Berlin, Germany." The direction was to him at the "Union Club, Berlin." *Held*, that, as the affidavit stated that this was his place of residence, it showed a substantial compliance with the order. (*Id.*)
17. Jurisdiction of the person of a defendant having been acquired, it is not lost by the premature entry of his default, and a reference of the action for the purpose of taking the proofs. (*Id.*)
18. Where the plaintiff in a divorce suit had, on the faith of the judgment therein, married an innocent third person: *Held*, that the judgment should be allowed to stand for their protection, until it should appear that the plaintiff had no right to the relief it had provided for her. (*Id.*)
19. After an equity case has been tried and finally submitted for decision, the court, at special term, has the power, of its own motion, to direct certain issues therein to be passed upon by a jury, if the case be one in which, under similar circumstances, the late court of chancery was authorized to direct a feigned issue. (*Brinkley* agt. *Brinkley*, 2 S. C. R., 501.)
20. The Code has not changed the former practice in respect to feigned issues, except so far as to substitute a simple interrogatory for the legal fiction of a wager. (*Id.*)
21. In an action to restrain defendant from bringing suits upon certain agreements made between him and plaintiff's agent, to cancel such agreements, and for an accounting, defendant set up a claim for expenses incurred on account of the agreements, and also damages arising from plaintiff's refusal to carry out the same. No reply was put in and no objection raised at the trial to the want of a reply. *Held*, that it was doubtful whether the failure to reply admitted the claim of defendant; but if it did the omission of defendant to object at the trial constituted a waiver of the defect in plaintiff's pleadings and the objection could not be raised on appeal. (*Holloway* agt. *Stephens*, 2 S. C. R., 562.)
22. An order refusing to grant a commission to take the testimony of a foreign witness affects a substantial right, and is appealable. (*Wallace* agt. *American Linen Thread Company*, 2 S. C. R., 574.)
23. An appeal was made from an order directing judgment, and not from the judgment. *Held*, that respondent could avail himself of the irregularity only by a motion to dismiss the appeal. (*Klots* agt. *Fincke*, 2 S. C. R., 580.)
24. The complaint set out a cause of action in trespass. At the trial, it appearing that the fee of the *locus in quo* was in the defendant, and that plaintiff had only an easement, the judge dismissed the complaint. *Held*, that whether, under the circumstances, the complaint should have been dismissed, or the pleadings conformed to the proof, was largely in the discretion of the trial judge, and that, in this case, it would not be interfered with. (*Birdswall* agt. *Williams*, 2 S. C. R., 605.)
25. On a trial at the circuit, the court directed a verdict for the plaintiffs, subject to the opinion



## Digest.

- of the court at general term, on a case. The court, at general term, set aside the verdict, upon the ground that plaintiff was not legally entitled to recover. Upon a motion for reargument, *held*, that this was simply a mistrial; that the proper course was for the general term to review the proceedings and order a new trial, but the former decision having accomplished the same end a reargument should be denied. (*Coo-gan* agt. *Mayor of New York*, 2 S. C. R., 667.)
26. Where the plaintiffs were described in the title of the cause as executrix and executor, and, in the body of the complaint, a good cause of action is completely alleged and set forth, but it appears to be in the plaintiffs' own right, and not in their representative capacity, *held*, that a demurrer on the grounds that the plaintiffs had no capacity to sue, if not appearing from the complaint that they were executrix and executor, and that the complaint did not state facts sufficient to constitute a cause of action, was frivolous. (*Murray* agt. *Church*, 1 *Hun*, 49.)
27. An order of the general term, determining an appeal from an order, made when the representatives of a party, dying pending the appeal, were not properly before the court, is irregular, and may be set aside on motion at special term. (*Jay* agt. *De Groot*, 1 *Hun*, 118.)
28. Where a judgment for divorce has been obtained by the plaintiff against the defendant, and the plaintiff has subsequently died; *held*, that a motion made upon papers served upon his administrator, to set aside the judgment for fraud and irregularity, was properly denied. (*Watson* agt. *Watson*, 1 *Hun*, 267.)
29. Exceptions to the refusal of a referee to find additional facts will not lie. A party deeming it necessary that the referee shall pass upon additional questions of fact, must move for an order sending back the report, with instructions to add findings upon such questions. (*Rogers* agt. *Wheeler*, 52 *N. Y. R.*, 262.)
30. Where a clause is inserted in a judgment without authority, the proper remedy is by motion in the court below to correct the judgment, not by appeal. (*People ex rel. Goff*, 52 *N. Y. R.*, 434.)
31. Where a question arises as to whether a pleading has been made and served according to the law and the practice of the court, so as to become a part of the pleadings in the case, the proper practice is to present the question for determination by motion to strike it out in case it has been served, or to compel its acceptance in case of a refusal to receive it. (*Fredericks* agt. *Taylor*, 52 *N. Y. R.*, 596.)

## PROCESS.

1. The opinion at general term in this case, *INGRAHAM*, P. J., involving the question of the regularity of service of process upon unknown owners in *partition* cases, is reported in 46 *Howard's Practice Reports*, 205. An appeal was taken to the court of appeals and the decision was affirmed, with costs, in April, 1874. (*Sanford* agt. *White*, ante, 96.)
2. The rule that an officer is protected against an action by his process applies as well in an action of *replevin* as in other actions. (*Barron* agt. *Boyd*, 1 S. C. R., 457.)

## PROMISSORY NOTES.

1. A note was discounted and held by the bank where it was made

## Digest.

- payable. At the time it became due the maker had no funds at the bank for its payment. *Held*, that no formal demand of the maker was necessary under the circumstances, for the purpose of charging the indorsers. (*First Nat. Bank of Groton* agt. *Crittenden*, 2 S. C. R., 118.)
2. A notice was dated and mailed upon the next day after the note became due, and stated that the note was "this evening protested for non-payment, the same having been duly presented and payment demanded, which was refused." *Held*, that the notice was mailed in time, and was, in form, a good notice of demand and refusal, upon the day preceding. (*Id.*)
3. A promise by an indorser to pay an overdue note must be made with full knowledge of any defect in the demand and notice, in order to amount to a waiver of such defect (*per P. POTTER, J.*) (*Id.*)
4. The indorser of a promissory note received this notice: "The note given to Sarah E. Barnes by George B. Hutchins for \$100, dated the 24th day of May, 1866, is this day due; that if the note is not paid by Hutchings, she (Mrs. Barnes) will hold you for the note." *Held*, not sufficient to charge the indorser. (*Barnes* agt. *Barrus*, 2 S. C. R., 390.)
5. Plaintiff agreed to sell to a firm certain property and to accept therefor the note of the firm, indorsed by M. A note payable to the order of plaintiff was made, and the indorsement of M. procured, M. being ignorant of the agreement between plaintiff and the firm. *Held*, that M. was not liable to plaintiff upon the note. (*Hull* agt. *Marvin*, 2 S. C. R., 420.)
6. Plaintiff left a note made by defendant for \$55.17 at a bank for collection. The note was not paid when due. After it had been overdue some days, and was still in possession of the bank, defendant's agent deposited with the bank a draft for \$20, directing that the same, when collected, be applied upon the note. The avails of the draft were credited to the agent and the note unpaid returned to plaintiff. *Held*, that the transaction between the agent and bank did not constitute a part payment of the note. (*Whipple* agt. *Walker*, 2 S. C. R., 456.)
7. Plaintiff bought of defendant a promissory note not due, purporting to be made by B., defendant declining to make himself responsible therefor. The note not being paid, plaintiff sued B., who set up that his signature was forged. Plaintiff asked defendant to prosecute the case, and gave him notice that he should hold him responsible for all costs if the note was proved to be forged. Defendant refused to prosecute, and, at the trial, the note was held to be forged. *Held*, that these facts established a cause of action against defendant; that the judgment of B. was conclusive evidence, as to defendant, of the forgery of the name of B., and the amount of costs plaintiff had to pay him, and that defendant was liable to plaintiff for the amount paid for the note, and the costs and expenses he was subjected to on account of the action against B. (*Bell* agt. *Dagg*, 2 S. C. R., 623.)
8. *Held*, also, that in such an action, although no fraud is shown, the rule of damages is the same as it would be in an action upon an express warranty accompanied with fraudulent knowledge and representations. (*Id.*)
9. Action upon two promissory notes, made by defendants to the order of plaintiff's testator. Defendant set up as a defense, that the notes were given in part payment of a farm, purchased of the plaintiff's testator; that the party selling the

## Digest.

- land for him, represented the land sold to cover a certain cedar knoll, which the defendant asserts it did not, and that damages to a much larger extent than the notes had resulted. The proof showed that the notes were given after a full knowledge of the fact of the real extent of the land, and after efforts had been made, by those acting with defendants, to purchase the knoll, and that after the notes came due, promises were made to pay on a note given, as those were, with full knowledge or means of knowledge of the extent of the purchase. *Held*, that the law will not sustain such a defense. (*Isham agt. Davison*, 1 *Hun*, 114.)
10. This action was brought on a promissory note, made by the defendant, payable to the plaintiff or bearer. At the trial, the note was produced by a witness, who claimed to own it as administrator of an estate, while the plaintiff testified that he owned the note, and that it had never been transferred or paid. *Held*, that the plaintiff was not entitled to recover as he had not possession of the note and it was not lost. (*Crandall agt. Schroepfel*, 1 *Hun*, 557.)
11. A party paying a promissory note, or negotiable bill, is entitled to the delivery of such note or bill, on payment, or its production, that it may be discharged or destroyed in his presence. (*Id.*)
12. A party having notice of the fact that a note has upon it an accommodation indorser, and who does not part with anything upon the faith of its transfer to him, stands in no better position than the maker, and cannot recover thereon against the indorser. (*Powers agt. French*, 1 *Hun*, 582.)
13. The distinction between a promissory note and other contracts, is, that in the former a consideration will be presumed, and in the latter it must be proved. (*Id.*)
14. An admission in the answer, of the making, indorsement and transfer of a promissory note, does not preclude the defendant from showing that there was no consideration; that the indorsement was lent; and that the consideration paid by the plaintiff was in fact the money of the party to whom the indorsement was lent. (*Id.*)
15. This action was upon a promissory note made by S. & M., payable to the order of the plaintiffs and indorsed by the defendant. The complaint alleged that the plaintiffs were the owners of the note, and "that the defendant indorsed said note at the time of the making thereof." The note was set out in full, but a copy of the indorsement was not given. The defendant demurred. The plaintiffs moved for an order directing judgment for them, on the ground that the demurrer was frivolous, which was granted. *Held*, that this was error; that in order to entitle the plaintiffs to recover, it was necessary for them to allege the special circumstances charging the defendant as first indorser, to rebut the presumption that he was second indorser. (*Woodruff agt. Leonard*, 1 *Hun*, 632.)

## Q.

## QUESTIONS OF LAW AND FACT.

1. The construction of a written instrument is a question of law, and every court to whom the question of construction is submitted is entitled to the benefit of every circumstance which the law permits to be taken into consideration in determining the meaning of the particular words used. An appellate court is, therefore, not bound by the conclusions of the court below as to those circumstances. (*St. Luke's Home agt. Ass'n for Ind. Females*, 52 *N. Y. R.*, 191.)



## Digest.

2. The right to determine as to the existence of one fact from another which is established, is exclusively within the province of a jury. (*Justice agt. Lang*, 52 N. Y. R., 323.)
3. The tenor of a note given to a mutual insurance company is not conclusive upon the question as to whether it was given as a premium or a stock note, but that question may be determined by the facts and circumstances attendant upon its making, and is a question of fact for a jury. (*Jackson agt. Van Slyke*, 52 N. Y. R., 645).

## QUO WARRANTO.

1. Proceedings in the nature of a *quo warranto* under chapter 2 of title 13 of the Code are a civil action, and the prevailing party is entitled to costs. (*People ex rel. agt. Clute*, 52 N. Y. R., 576.)
2. Where the complaint in such action alleges that defendant has usurped the office in question, and that the relator is entitled to it, and issue is taken upon both allegations, in case judgment is given against the defendant ousting him from the office, the people and relator, plaintiffs, are the prevailing party, and as such are entitled to costs, although the judgment also determines that the relator is not entitled to the office. (*Id.*)

## R.

## RAILROADS.

1. In an action brought under the statute for the negligent killing of plaintiff's intestate while a passenger on defendant's road, the evidence showed conclusively that there was no negligence or want of proper care, on the part of the defendant, in the management of

their road or in running their cars at the time of the accident, but the evidence was clear and convincing to establish the fact that the *misplacement of the switch* which caused the accident by which the death ensued, was done by some evil-disposed person, not connected with the road, shortly preceding the arrival of the train in the nighttime. (*Keeley agt. Erie Railway Co.*, ante, 256.)

2. *Held*, that the plaintiff's *nonsuit* at the circuit, upon such evidence, was clearly correct. (*Id.*)

## RAILROAD AID BONDS.

1. Under this statute, commissioners of the town of Venice issued twenty-five town bonds of \$1,000 each. Five of these bonds were sold for cash, and the money paid to a railroad company. The remainder of them were delivered to the company in payment of stock taken by the town, and by such company sold to purchasers. In an action by the town to compel holders of the bonds to surrender such bonds for cancellation: *Held* (following *Starin agt. Town of Genoa*, 23 N. Y., 439), that a want of consent of two-thirds of the tax-payers rendered the bonds issued void; that the transfer of bonds directly to the railroad company, in payment of stock, was a misappropriation, rendering void the bonds transferred, and that the affidavits of the commissioners were not competent evidence that the requisite number of tax-payers had given consent. (*Town of Venice agt. Breed*, 1 S. C. R., 130.)
2. *Held*, also (*Talcott, J., contra*), that the plaintiff was not bound to return the stock purchased by it to enable it to maintain the action for cancellation of the bonds. (*Id.*)
3. The different holders of the bonds sought to be canceled could be

## Digest.

- joined as defendants (34 *N. Y.*, 30). (*Id.*)
4. Several of the defendants set up statutes of limitation. *Held*, that the right of action accrued when the bonds were transferred, and, as to defendants setting up the statute of six and ten years, the right of action was barred. (*Id.*)
  5. One of the defendants set up as counter-claim indebtedness of the plaintiff for money borrowed. *Held*, not allowable. (*Id.*)
  6. In proceedings by certiorari to review the action of a county judge in proceedings to bond the town of D. under chapter 907, Laws of 1869, and chapter 925, Laws of 1871, *held*, that the fact that the relator had signed the consent required by law to authorize the bonding, did not preclude him from acting individually as relator in the proceedings by certiorari. *Held*, also, that the town was entitled to institute proceedings by certiorari for the same purpose. (*People* agt. *Wagner*, 1 *S. C. R.*, 321.)
  7. The refusal of the county judge, at the hearing before him, to permit tax-payers who have signed to withdraw their consent to the bonding, *held*, erroneous. (*Id.*)
  8. In proceedings to bond the town of I. in aid of a railroad, under chapter 925, Laws of 1871, the petition to the county judge contained the names of forty persons who were not residents of the town. The names of these persons appeared upon the town assessment roll as "non-residents," but the provisions of the statute relating to assessment of lands of non-residents were not complied with. *Held*, that the lands were not taxed as non-resident lands, and the owners thereof could not join in the petition for bonding the town. (*People ex rel. Clark* agt. *Oliver*, 1 *S. C. R.*, 570.)
  9. The statute makes non-resident owners of land tax-payers, and when their names appear on the assessment roll although not properly taxed, they must be included in estimating the number necessary to unite in a petition for bonding a town. And their property taxable in the town must be taken into account in ascertaining the aggregate valuation of the taxable property, notwithstanding the assessment may not be legally binding upon them. (*Id.*)

## RECEIVER.

1. The provisions of chapter 151, of the Laws of 1870, cover all the cases mentioned in title 4, chapter 8, part 3, of the Revised Statutes, providing for the appointment of a receiver of a corporation upon the petition of a judgment creditor, after execution returned unsatisfied; and, since the passage of said act, the remedies therein provided must be pursued. The plaintiff recovered a judgment against the defendant, upon which execution was issued, and returned wholly unsatisfied. Upon an affidavit showing these facts, and, that the defendant was insolvent, he then applied, upon motion, eight days' notice of which had been given, for an order appointing a receiver. The motion was granted, and a receiver appointed. *Held*, that the proceedings were irregular, as not being authorized by section 3, of chapter 151, Laws 1870, and that the order appointing a receiver should be reversed. (*Clinch* agt. *South Side R. R. Co.*, 1 *Hun*, 636.)
2. In an order of a county judge appointing a receiver, in supplementary proceedings, the receiver was required to execute a bond with sureties. *Held*, that at least two sureties were required, and an obligation under sale; and the execution and filing of an instrument in the form of a bond, not sealed, and signed by only one

## Digest.

surety, did not authorize the receiver to act. (*Johnson agt. Martin*, 1 S. C. R., 504.)

## RECOGNIZANCE.

1. An error in a recognizance entered into in December, 1873, in describing the next term of the court of general sessions as one to be held on the first Monday of January, 1873, instead of 1874, was a mistake which could mislead no one, and especially not the surety. The year 1873 inserted after January might be regarded as surplusage. (*People agt. Welch*, ante, 420.)

## REFEREE.

See EVIDENCE.

*Taft agt. Wright*, ante, 1.

See REPORT OF REFEREE.

*Cooley agt. Decker*, ante, 188.

1. Where a referee, after the cause has been tried by him, summed up and submitted to him for decision, approaches the party (plaintiff) against whom judgment is finally rendered, suggesting a proposed sum "as having been discussed or spoken of" by his antagonist's counsel, with the intimation that "there were matters in evidence in the case which led him to believe that, if he did give judgment for the defendants, it would necessarily be for a large amount," and that "it might be well to think the matter over in that light, and perhaps it might be for their interest to settle it;" it is the duty of the court to interfere and set aside the report of the referee for such irregularity (*This decision affirms that rendered at special term, FANCHER, J.*, 44 How. Pr. R., 357). (*Livermore agt. Bainbridge*, ante, 350.)

See APPEAL.

*Livermore agt. Bainbridge*, ante, 354.

2. At the trial, evidence objected to by the defendant, was received by the referee, subject to his retaining or rejecting it at the conclusion of the case. *Held*, that, as the evidence so received was competent, this decision could not operate injuriously, or in any way affect the defendant's rights; it must be considered the same as if the evidence had been admitted absolutely, which would have been entirely proper. (*Kerslake agt. Schoonmaker*, 1 Hun, 436.)
3. The appointment, by the court, of a referee, nominated by one party and approved by the other, is no violation of Rule 73, and no irregularity. (*White agt. Coulter*, 1 Hun, 357.)
4. Where a referee receives evidence objected to, reserving the question of its admissibility, he ought, before closing the case, to make his final ruling, receiving or rejecting the evidence, and advise the parties, so that the proper exception may be taken. Failing to do this, the court, on motion, might open the case and send back the report, or, on appeal, treat the action of the referee as error, when the evidence was so far material that it may have had some influence on his findings. (*Berrian agt. Sanford*, 1 Hun, 625.)
5. Two actions were pending between the same parties, one in the court of common pleas, and the other, the present action, in this court, both of which were referred to the same referee. An order was made by the referee, that the issues in the action in the common pleas should be tried first, and that if they were decided against the defendant, that then an accounting should be had to determine the amount due. The actions were tried before the referee, who subsequently filed his



## Digest.

report, and directed that judgment be entered for the plaintiff in the action in this court. The defendant applied to have the report set aside, claiming that he had been misled, that he understood the order to apply to both actions, and that he had therefore failed to introduce proof as he had intended to do at the proper time, to reduce the amount of plaintiff's demand. The motion was denied. Upon appeal to the general term, *held*, that its denial was error. That as it appeared that defendant had been misled, that an order should be entered vacating the report so far as it related to the amount of the recovery, and directing the referee to proceed to try and determine the question as to the amount the plaintiff is entitled to recover. (*Devos* agt. *Nutter*, 1 *Hun*, 713.)

6. Exceptions to the refusal of a referee to find additional facts will not lie. A party deeming it necessary that the referee shall pass upon additional questions of fact, must move for an order sending back the report with instructions to add findings upon such questions. (*Rogers* agt. *Wheeler*, 52 *N. Y. R.*, 262.)

7. The duties of a referee appointed in a foreclosure suit to sell the mortgaged premises are ministerial in their nature. He cannot vary the judgment in prescribing the terms of sale, nor relieve himself thereby from the performance of his duties. If he pays over money in disregard of the directions in the judgment, he does so at his peril and in his own wrong. (*People ex rel.* agt. *Bergen*, 53 *N. Y. R.*, 404.)

8. The report of a referee, like the verdict of a jury, cannot be set aside, when based upon evidence fairly conflicting, except where the report is so manifestly against the weight of the evidence as to make it apparent that some mistake, bias or partiality has inter-

fered with the cause of justice. (*Dalzell* agt. *Raw*, 1 *S. C. R.*, *Addenda*.)

9. Where there is no statement that the case on appeal contains all the evidence, it must be presumed that the evidence was sufficient to sustain the findings. (*Id.*)

## REFERENCE.

1. In an action upon a policy of insurance upon a single stock of goods, it appeared that such stock consisted of fifty-one items. *Held*, that the demand of the insured did not constitute an account such as to authorize a compulsory reference. (*Brink* agt. *Republic Fire Insurance Company*, 2 *S. C. R.*, 550.)

2. *Held*, also (*BARRETT, J., dissenting*), that by appearing and proceeding to trial under a compulsory order of reference, the party not consenting to the order did not waive his right to a jury trial. (*Id.*)

3. Plaintiff moved to vacate an order of reference upon the ground that the case had been finally submitted to the referee, and he had failed to make his report within the time limited by law. By the opposing affidavits and papers it appeared that the case had not been finally submitted and the motion was denied. Afterward plaintiff obtained an order to show cause why the same relief first applied for should not be granted. From an order denying plaintiff's second motion an appeal was taken. *Held* (*BARRETT, J., dissenting*), that the order of reference could be vacated upon the ground that the case was one in which a compulsory reference was not authorized, notwithstanding plaintiff did not make that a ground of his motion and had not appealed from the previous orders. (*Id.*)

## Digest.

4. In an action where the parties had mutual claims against each other on account, the referee made a general finding in favor of the plaintiff, but gave no items of account. *Held*, that the referee should have required the parties to present their accounts in the form of debtor and creditor, and should, in his findings, have stated the items allowed distinctly. Every judgment rendered by a referee should rest upon facts warranting it, distinctly and explicitly found and stated. (*Spooner* agt. *Lefevre*, 2 S. C. R., 666.)
5. The practice which formerly prevailed in the court of chancery, of determining the rights of parties to suits in equity, in the first instance, upon the hearing, by an interlocutory decree, and then, when necessary, referring the case to a master, to take and state the account, still continues in force. A report of a referee, made in this manner, sustains all the relations to the case the former interlocutory decree did, in hearings had in the court of chancery. (*Mundorff* agt. *Mundorff*, 1 *Hun*, 41.)
6. Ordinarily, where the whole issue is referred, it is the duty of the referee to take, state and adjust the accounts of the parties on the basis on which, by his decision, he may settle their rights. (*Id.*)
7. But where for any reason this is not done, and an interlocutory report only is made, by which the rights of the parties are determined, and a further hearing is directed, to settle the accounts between them, the court has power to direct that to be done before another referee. (*Id.*)
8. Such decree may now be reviewed at general term, by a motion for a new trial. (*Id.*)
9. Where an exception to a ruling or direction of a referee is specific, resting on special grounds and reasons, no objection to the ruling or direction, except those so specified, will be considered upon appeal. (*Union Manufacturing Company* agt. *Byington*, 1 *Hun*, 44.)
10. The complaint contained two counts, each for work, labor and materials. The services were performed, and materials furnished, in engraving and printing a large number of bonds, coupons and certificates. From the schedule appended to the complaint, it could not certainly be determined whether the cause was referable. Plaintiff's agent made an affidavit, which was used on the motion, which stated positively that the trial of the action would require the examination of a long account. The answer was a general denial, and the affidavit of plaintiff's agent was in no way controverted; *held*, that the court had sufficient before it, to justify the making of an order referring the cause. (*Bank Note Company* agt. *Industrial Exhibition Company*, 1 *Hun*, 118.)
11. A referee will not be appointed to take the affidavit or deposition of any person to be used upon an *ex parte* motion. (*DeHart* agt. *Hatch*, 1 *Hun*, 238.)
12. A decree, giving a construction to a will and appointing a referee, and also making him a receiver, with power to carry his decision into effect without previously making his report to the court for confirmation, in an action brought for the construction of a will, for an accounting, sale of real property, and for other relief, goes further than is usual, and should be modified by making the reference to the referee merely interlocutory, with direction to report to the court upon all the facts, matters, &c. (*Fisher* agt. *Hubbell*, 1 *Hun*, 610.)
13. The character of an action is determined by the complaint. If that is upon contract, the action is

## Digest.

referable, and although the answer sets up fraud in the transaction, and claims damages by way of recoupment or counter-claim, it does not change the character of the action or render it non-referable. (*Welsh* agt. *Darragh*, 52 N. Y. R., 590.)

14. If the facts appearing upon a motion for a reference will warrant a finding that the action involves the examination of a long account, and the court below decides to refer, this court will not review such finding. It is only where no such account can be involved that an appeal will lie to this court. (*Id.*)

## RELEASE.

1. A contract, under seal, may be released or modified by a parol agreement which is carried into effect. (*Jenks* agt. *Robertson*, 2 S. C. R., 255.)

## REMEDIES.

1. Where, upon the report of a referee in such proceedings simply directing a sale of the premises, a personal judgment against the owner is entered, the proper remedy is by motion to the supreme court to correct the judgment. The point cannot be raised upon appeal. (*Moran* agt. *Chase*, 52 N. Y. R., 346.)
2. Where a clause is inserted in a judgment without authority, the proper remedy is by motion in the court below to correct the judgment, not by appeal. (*People ex rel.* agt. *Goff*, 52 N. Y. R., 434.)
3. An attachment is a proper remedy against an attorney who retains money and refuses to pay it over that justly belongs to his client, and good faith in withholding the

money is no ground for exemption from such remedy. (*B. G. Savings B'k* agt. *Todd*, 52 N. Y. R., 489.)

4. The only remedy strictly of right to a party sued by one of several claimants of the same debt or duty, which debt or duty he acknowledges, and is ready to render, but knows not to which of the claimants he ought of right to render it, is by action in the nature of a bill of interpleader. It is within the discretion of the court to refuse this relief upon summary application in an action against such party; and when granted it is equally within the discretion of the court, upon application and cause shown, to vacate it. (*Barry* agt. *The Mutual Life Ins. Co.*, 53 N. Y. R., 536.)

## REMOVAL OF CAUSES.

1. Where a suit is brought in a state court by a citizen of the state against several defendants residing in another state, it is not competent for one of said defendants to apply for the removal of the cause to the federal court under the provision of the act of congress of March 2, 1867 (14 *Stat. at Large*, 558), unless the other defendants are improper, formal or unnecessary parties; but all must unite in the application. (*Cooke* agt. *State Nat. Bank*, 52 N. Y. R., 96.)
2. Where, however, by virtue of a state statute, two causes of action against different parties are united which, but for the statute, it would be improper to unite in one suit, and where the defenses are distinct and independent of each other and separate judgments can be entered, one of the parties defendant cannot be deprived of his right of removal because of this union. (*Id.*)
3. *It seems* that, in such case, by the removal the action would be severed, one going to the federal, the



## Digest.

other remaining in the state court. (*Id.*)

4. The act of 1867 requires the affidavit of the party seeking to remove a cause. A corporation, therefore, by reason of its incapacity to make the affidavit, cannot avail itself of the act. The necessary affidavit cannot be made by its officer. (*Id.*)

5. A national bank, organized under the acts of congress, is a resident of the state in which it is located and does business, within the meaning of the act of 1789, authorizing the removal of causes into the United States courts. The plaintiff's attorneys opposed a motion, made by the defendant, for the removal of this cause into the United States court, on account of certain defects in the copies of the papers served upon them. *Held*, that as the defects did not exist in the papers themselves, on which the application was made, that they were properly disregarded. On the 15th of December, 1873, a notice of the defendant's appearance in this action was served upon the plaintiff's attorneys. *Held*, that the mere notice of an appearance was not the *entering of an appearance* required by the act of congress, nor a sufficient compliance with Rule 7 of this court. The petition filed by the defendant for the removal of the cause, contained the statement that it then entered its appearance and had not done so before; and the order requiring the plaintiff to show cause why the application should not be granted, recited the fact that the defendant, on the day of its date, had entered its appearance; *held*, that these statements sufficiently showed an entry of appearance, and that, even if they did not, procuring the order and making the motion were equivalent to the entry of an appearance within the technical meaning of the term. (BRADY, J., *dissenting*.)

(*Chatham Nat. Bank agt. Merchants' Nat. Bank*, 1 Hun, 702.)

## REPORT OF REFEREE.

1. Where a referee, under an order of the court, makes an amended report in the cause while sojourning in a foreign country (Switzerland), which is returned and filed here, it is not invalid for want of jurisdiction. (*Cooley agt. Decker*, *ante*, 188.)
2. Where a referee, after the cause has been tried by him, summed up and submitted to him for decision, approaches the party (plaintiff) against whom judgment is finally rendered, suggesting a proposed sum "as having been discussed or spoken of" by his antagonist's counsel, with the intimation that "there were matters in evidence in the case which led him to believe that, if he did give judgment for the defendants, it would necessarily be for a large amount," and that "it might be well to think the matter over in that light, and perhaps it might be for their interest to settle it;" it is the duty of the court to interfere and set aside the report of the referee for such irregularity (*This decision affirms that rendered at special term*, FANCHER, J., 44 How. Pr. R., 357). (*Livermore agt. Bainbridge*, *ante*, 350.)

See APPEAL.

*Livermore agt. Bainbridge*, *ante*, 354.

## S.

## SALARIES.

1. The power to do a specific act, conferred by the legislature, is exhausted when that act is performed. (*Smith agt. Mayor, &c.*, of N. Y., *ante*, 277.)

## Digest.

2. A reference in an act of the legislature to a fact, does not render valid the authority under which that fact had come into existence. The authority to increase the pay of an official cannot be established by implication of law; it must be by direct and positive enactment. (*Id.*)
3. The fact that an appropriation of money, made by the legislature for the payment of the salaries of certain officials, is sufficiently large to cover the sum claimed by one of them, is no authority for its payment. (*Id.*)

## SALE OF STOCK.

See STOCKHOLDERS.

*Mitchell* agt. *Vermont Copper Mining Co.*, ante, 218.

## SALE ON EXECUTION.

See EXEMPT PROPERTY.

*Snyder* agt. *Davis*, ante, 147.

## SCHOOL LAW.

1. Plaintiff brought action in a justice's court against the trustees of a school district for seizing certain property. A judgment was rendered in favor of plaintiff. The justice certified that defendants' act was done in bad faith. Defendants appealed to the county court, and upon a retrial judgment was rendered against them. The county judge certified at the trial that the act was done in good faith. After judgment, defendants moved for a new trial, which was denied, whereupon they appealed. The judgment was affirmed, with costs of appeal. After the affirmance the county judge, before whom the action

was tried, gave a certificate that the appeal was in good faith. *Held*, that there was no provision of law for granting the certificate of bad faith. Neither was there any authority for the second certificate of good faith. (*Willey* agt. *Shaver*, 1 *S. C. R.*, 324.)

2. The certificate of good faith given at the trial, however, exempted defendants from costs, not only at the trial, but upon all subsequent proceedings in the action. (*Id.*)
3. *Held*, also, that the allowance of costs of appeal by the order of affirmance, the right to such costs depending upon the statute and not upon the discretion of the court, did not preclude defendants from objecting to the insertion thereof in the judgment. (*Id.*)

## SERVICE.

1. A citation on proof of a will may be served and proof thereof made by an executor or legatee under the will. (*Wetmore* agt. *Parker*, 52 *N. Y. R.*, 450.)
2. The probate of a will cannot be attacked collaterally for an irregularity in the service of the citation. (*Id.*)

## SERVICE BY PUBLICATION.

1. Where the proof tends strongly to establish the facts, of which a judge is required by the statutes to be satisfied (*Code*, § 135, &c.), in order to acquire jurisdiction to make an order for the publication of the summons, his acts in issuing such order are not void, although they may be erroneous and subject to be vacated on error or appeal. (*Smith* agt. *Matson*, ante, 118.)
2. Where the proof is sufficient to require the judge to decide as to the residence of the defendant,

## Digest.

and as to where the summons and complaint should be directed to him by mail, and his direction in the order is erroneous in that particular, it is not void. (*Id.*)

3. Such an order is valid until set aside; and the plaintiff, on compliance with it, is entitled to apply to the court for judgment. (*Id.*)
4. It is competent for the court to order the filing of security for restitution, in case the defendant should become entitled to it. (*Id.*)
5. The defendant is not precluded, by lapse of time, from moving to set aside the judgment entered against him by default, in such a case, as being void, upon the usual affidavit of merits and advice of counsel, although notice of the judgment was served upon him some thirteen years prior to the motion. (*Id.*)
6. The jurisdiction of all courts and officers may be questioned whenever their proceedings or decisions are made the foundation of any claim. (*Id.*)
7. *Quere*: Whether the statute, in relation to the service of summons by publication (*Code*, § 135), does not authorize, in the case of an absconding or concealed defendant, resident of this state, a general judgment, without previous attachment, or seizure of any property. If so, the court cannot, by general rule (34), deprive the party of the benefit of the statute. (*Id.*)
8. Where considerable evidence was shown, by affidavits, to obtain an order for service of the summons by publication, that the defendant could not, after due diligence, be found within the state; and positively averred by the plaintiffs, on personal knowledge, that the defendant was a non-resident and his actual place of residence abroad was given; also averred in terms that "the defendant cannot, after

due diligence, be found within this state, he now being, as deponent is informed and believes, at or near Milford, in the state of Pennsylvania aforesaid," his place of residence; also that the plaintiff's attorney stated "that he had sent to the sheriff of Orange county (which adjoins the county of the defendant's residence in Pennsylvania) a copy of the summons and complaint in this action, to be served upon said defendant, if he could be found, \* \* and had received a telegram from the sheriff stating that he had been unable to serve said summons;" *held*, sufficient to give the officer jurisdiction to make the order. (*Handley agt. Quick, ante*, 233.)

9. Where the plaintiff's affidavits distinctly averred, on information and belief, the existence of the fact that the defendant *had property within this state*, and then related a circumstance of which they had been informed, and the source of their information, having a tendency to prove it, but did not state whether this was all the information they had on the subject; *held*, that this was barely sufficient to enable the officer to pass upon the question. It is doubtless true that this is a fact, the actual existence of which is essential to the jurisdiction of the court. (*Id.*)

## SET-OFF.

1. In an action brought by an executor upon a cause of action arising after the decease of the testator, the defendant cannot set off a demand against the testator, even although such demand existed at the time of the testator's death. In order to authorize such set-off, the demand must not only be sued by the executor, but it must be upon a cause of action which had accrued at the time of the decease of the testator or intestate. (*Patterson agt. Patterson*, 1 *Hun*, 323.)



## Digest.

2. An action for assumpsit lies for money obtained by oppression, imposition, extortion or deceit; and the demand for the money so obtained, may be set up as a set off in an action brought by the party against whom it exists. The assignee of such party takes a cause of action subject to such defense of set-off. In setting off a cause of action, in form, in assumpsit, but arising from tort, it is proper to set forth the fraud and collusion upon which the cause of action depends. (*Harway* agt. *The Mayor*, 1 *Hen*, 628.)

## SHERIFF.

1. The sheriff is restricted to the fees given to his office by statute. (*Crofut* agt. *Brandt*, ante, 263.)

2. He is not entitled, on execution, to expenses paid to keepers, nor charges for cartage or storage, nor insurance, nor for any other expenses incurred by him not expressly allowed by statute (*Id.*)

3. Whether, if he incurs any expense for the benefit or convenience of either of the parties, and upon the promise to repay him, he can recover such expenses of that party, *quere*. (*Id.*)

4. The plaintiff had been declared a bankrupt under the United States bankruptcy law, and an assignee appointed who had, under the provisions of that act, set apart to plaintiff a piano. Defendant, a sheriff, by virtue of an execution against plaintiff, issued upon a judgment which had been entered before the bankruptcy proceedings were commenced, seized upon the piano. *Held*, that the sheriff was protected by his process, and that an action to recover the piano would not lie. (*Barron* agt. *Boyd*, 1 *S. C. R.*, 457.)

5. Defendant, a sheriff, under an order of arrest in an action by plaintiff against G., arrested G. and took from him an undertaking signed by two sureties, who failed to justify upon being accepted to by plaintiff. G. escaped, and after judgment and executions returned unsatisfied, plaintiff brought an action for the escape. During the pendency of this action, defendant rearrested G. and surrendered him in the county jail. *Held*, that defendant was exonerated from his liability upon paying the costs of the action. (*Brady* agt. *Brundage*, 2 *S. C. R.*, 621.)

6. Where a claim is made against a sheriff for money in his hands, and there is any doubt as to who is entitled to it, it is usual for the court, for the protection of the officer, to refuse to compel him to decide the controversy at his own risk. (*Mills* agt. *Davis*, 53 *N. Y. R.*, 349.)

7. A summary application to compel such a determination and to require him to pay over the moneys is in the discretion of the court to which it is made, and its decision thereon is not reviewable here. (*Id.*)

## SLANDER.

1. These words: "He is no doctor; he bought his diploma for \$50," spoken of a person in his professional character, *held* actionable in themselves. (*Bergold* agt. *Puchta*, 2 *S. C. R.*, 532.)

## SPECIAL TERM.

1. Where an action was noticed for trial, at a special term to be held at the chambers of a justice of the supreme court, in the town hall, and, at the appointed time

## Digest.

and place, the action was, by the consent of the parties, tried before another justice, at an adjourned special term then held by him in another room of the town hall; *held*, that if there was any irregularity in so doing, it was waived by the appearance and consent of defendant's attorney. (*White agt. Coulter*, 1 *Hun*, 357.)

2. In an action heretofore brought, in this court, to which the plaintiff and her husband were defendants, it was decided at the general term, reversing the judgment of a referee, that they were entitled to a life estate in the land, for damages to which, this action was brought, and to a deed conveying the same to her and her husband, to have and to hold the same so long as they, or either of them, should live. The judgment was affirmed in the court of appeals, and judgment absolute ordered for the defendants; on filing the remittitur, an order was made at the special term directing the land to be conveyed to Julia Ann Freeman, the plaintiff, for her natural life. *Held*, that in so far as this order directed her to receive a greater or different interest than that authorized by the judgment of the general term, it was of no effect, and not binding on the parties. (*Freeman agt. Barber*, 1 *Hun*, 433.)

## SPECIFIC PERFORMANCE.

1. Where the evidence to extend the time of performance of an agreement to sell and convey real estate is directly conflicting, the finding by the court below thereon will not be disturbed on appeal. (*Reede agt. Schneider*, ante, 379.)
2. Where the plaintiff is not in readiness to perform an agreement to convey real estate on the day specified in the contract, by reason of a failure to have released and discharged certain incumbrances on

the premises which were required to be done by the contract, and no extension of the time of performance is agreed upon, he cannot insist upon a specific performance of the contract. (*Id.*)

## STARE DECISIS.

1. The doctrine of *stare decisis* is one of great importance, and should not be departed from in the administration of justice, except in extreme cases founded upon some change in the law, either by legislation or by courts of last resort, or when the court is satisfied that an erroneous conclusion has been declared. The plaintiff's appeal in this case falls within this rule. (*Brennan agt. Mayor, &c., of N. Y.*, ante, 178.)

## STATUTE OF LIMITATIONS.

1. The Code, § 91, sub. 6, requiring a "discovery by the aggrieved party of the facts constituting the fraud," within six years previous to action, does not require personal knowledge of the fact. (*Taft agt. Wright*, ante, 1.)
2. If he has made a discovery of the essential facts by an attorney employed for that purpose, more than six years before action, the notice or knowledge thus obtained by the attorney is sufficient to charge his client. And the statute is well pleaded, especially where as here, there are indications that the transactions were in fact well known to the client. (*Id.*)
3. A new promise to revive a debt should be distinct, unambiguous and certain. A declaration which is intended only as an acknowledgment by the debtor of his subsequent indebtedness to the plaintiffs, incurred after the filing of his petition in bankruptcy, is

## Digest.

not sufficient to revive any part of the indebtedness covered by the discharge. (*Stern* agt. *Nussbaum*, ante, 489.)

4. Defendant wrote to plaintiff a letter containing the following: "I wish you would send a bill of items of your account (I have none, &c.), and as I expect to leave the city to be absent west about two weeks, I will see you soon after my return and will endeavor to close the matter satisfactorily to you." *Held*, sufficient to take the debt out of the statute, it being an acknowledgment of its existence in writing, subscribed by defendant. (*Whace* agt. *Higgins*, 1 S. C. R., 229.)
5. A certificate of deposit is not due until presented to the bank, and the statute of limitations does not run on it. (*Howell* agt. *Adams*, 1 S. C. R., 425.)

## STATUTORY CONSTRUCTION.

1. In making the assessment the commissioners acted judicially, and if they proceeded on right principles, their assessment would be conclusive. The county court could review their decree only upon the law or principles governing their action. (*People ex rel. Parker* agt. *County Court of Jefferson*, 1 S. C. R., 603.)
2. The review which this court can make in the proceedings is limited to the facts appearing upon the return of the county court to the certiorari. (*Id.*)

## STAY OF PROCEEDINGS.

1. A stay for an indefinite time, to await the result in the appellate court of an appeal in another action, because, only, of a hope that the judgment may be reversed, in

whole or in part, is not within the power of the court. Such a stay simply prevents a party from asserting a legal claim, until the decision of an appeal in another action. (*Waring* agt. *Yale*, 1 Hun, 492.)

2. In an action to foreclose a mortgage given to secure a bond containing a condition that, in case of default in the payment of interest for thirty days, the whole principal shall become due at the election of the mortgagee, where the complaint alleges the non-payment of interest and the election of the mortgagee that the whole become due, an order staying proceedings until further default cannot be granted in the absence of proof of fraud or improper conduct on the part of the plaintiff. (*CHURCH, Ch. J., dissenting.*) (*Bennett* agt. *Stevenson*, 53 N. Y. R., 508.)

## STEAMSHIP COMPANY.

1. A steamship company, incorporated under the laws of this state, having their principal place of business in the city of New York, — as a corporation their residence is in New York. (*Pacific Mail Steamship Co.* agt. *Com'rs of Taxes and Assessments*, ante, 164.)
2. Where their ships are registered at the port of New York under and pursuant to the United States registry act, the city of New York is their home port. They have and can have no other, and are taxable here only. Their situs is at the home port for all purposes of taxation, although they may be permanently engaged in commerce and business on the Pacific ocean. (*Id.*)

## STIPULATION.

1. The plaintiffs applied for an order setting aside a stipulation, made



## Digest.

in this action, vacating an order of arrest, alleging in their affidavits that their former attorney, who signed the stipulation, had no authority from either of them to make it, and that, for the purpose of obtaining thirty dollars, he willfully and corruptly stipulated away their rights herein; and that there are entries in the register of defendant's attorney, showing that, on the 6th June, 1870, such attorney made an agreement with the plaintiffs' attorney to pay him thirty dollars for a stipulation to discharge the order of arrest, and that he did pay that sum on that date for said stipulation; and that plaintiffs had just been informed, by their present attorney, of the signing of the stipulation by their former attorney. The court held that the affidavit of defendant's attorney did not satisfactorily meet the charge and that the stipulation should be annulled, but without prejudice to the sheriff, who was released by the order made upon it from all responsibility. (*Seaver* agt. *Moore*, 1 *Hun*, 305.)

2. All stipulations and agreements made between parties in the progress of an action in the supreme court, and affecting proceedings in it, and all orders entered thereon, are within the control of the court, and may be set aside in the discretion of the court whenever the parties can be restored to the same condition in which they would have been if no agreement had been made. An order, therefore, granting such relief is not reviewable in this court. (*Barry* agt. *Mutual Life Ins. Co.*, 53 *N. Y. R.*, 536.)

## STOCKHOLDERS.

1. All the material steps of a proceeding to sell out a shareholder of a stock company for non-payment of an assessment, when questioned, should be clearly and

satisfactorily proven; especially so important a one as the giving of notice of the time and place of sale to the person to be affected, and whose rights are to be cut off. (*Mitchell* agt. *Vermont Copper Mining Co.*, ante, 218.)

2. Where checks of the parties from whom assessments were due were requested by the treasurer of the company, the tender in that form must be held sufficient, especially so, where no objection was made at the time of the tender to payment by check. (*Id.*)
3. Where tender by check was made by a shareholder, for the amount of his assessment, to the president of the company on the morning of the day of sale, and before the sale, with directions not to have his stock sold for the assessment, *held*, that this was sufficient to prevent the sale. (*Id.*)
4. And where the sale of the stock was made, notwithstanding such tender and directions, and was bid in by the president, individually, who claimed to purchase it for himself, *held*, that the sale was invalid; that the president, the purchaser, acquired no title to himself, and the sale should be set aside. (*Id.*)

## STOLEN BONDS.

1. A municipal bond, payable in blank, with the addition following the blank of the terms "his executors, administrators or assigns," &c., is negotiable under the mercantile law. (*Dutchess County Mu. Ins. Co.* agt. *Huchfield*, ante, 330.)
2. Where the evidence on the trial showed that such bonds had been feloniously stolen from the plaintiff, their lawful owner, shortly before they were purchased by the defendants, *held*, that this im-

## Digest.

posed the obligation upon the defendants of proving, to the satisfaction of the jury, that their purchase was made for value, and in good faith, before they could establish a title to the bonds superior to that of the plaintiff as the preceding owner. (*Id.*)

3. Where fraud or illegality in the negotiation of commercial paper is shown, the law presumes a want of consideration in the transfer, and this presumption must be rebutted by the holder showing affirmatively that he gave value. (*Id.*)
4. Proof on the trial was given by the defendants, tending to overcome the presumption arising out of the circumstance that the stolen bonds were found in their possession, by showing that they were purchased by them for a valuable and adequate consideration, without notice of any infirmity in the title of their vendor. (*Id.*)
5. After the charge of the court had been delivered to the jury, the defendants' counsel requested the court to instruct the jury that if "Hachfield & Co. purchased these bonds in the open market for full value, and in the usual course of business, without notice or suspicion, they were not bound to make a close and critical examination in order to escape the imputation of bad faith in the purchase." The court declined to charge this proposition, and left it to the jury to say how much of an examination they were to make, and the defendants excepted to the refusal. (*Id.*)
6. *Held*, that this was error. The proposition presented by this exception seemed to be faultless. It presented the case of a purchase for full value, in the ordinary course of business, without notice or suspicion of the robbery creating the infirmity of title. And that was all which the law required to

be established to protect the defendants as the owners of the bonds. (*Id.*)

## SUMMARY PROCEEDINGS.

1. In summary proceedings to remove a tenant when the affidavit is made by the agent of the landlord, it must be stated affirmatively in the affidavit that he is such agent; it is not enough to state it by way of recital. (*People ex rel. Wyman agt. Johnson*, 1 S. C. R., 578.)
2. The appearance of a party solely for the purpose of objecting to the jurisdiction of the officer, or the regularity of the proceedings, does not waive the defects in proceedings, preliminary to such appearance. *Cunningham agt. Goellet* (4 Denio, 71), followed. (*Id.*)
3. The statutes relating to the allowance of set-off and counter-claim have no application to proceedings under the statute for the removal of tenants for non-payment of rent. They are solely applicable to actions, and to such actions only as are mentioned in the statutes. Accordingly where it was shown that a tenant had tendered one-half of the rent due and had a claim against the landlord for an amount equal to the balance, *held*, that such tender and claim did not constitute a legal answer to the affidavit of the landlord that the rent was not paid. (*People agt. Walton*, 2 S. C. R., 533.)
4. In order to give a magistrate jurisdiction in summary proceedings instituted by the grantee of a tax title from the city of Brooklyn, as authorized by the charter of that city (*Laws of 1854, chap. 384, title 5, § 33*), the affidavit presented must show that the applicant is entitled to the actual possession of the premises and that the occupant holds in hostility to his title. An

## Digest.

affidavit stating that the person in possession refused to deliver the same upon demand is insufficient. (*People ex rel. agt. Andrews*, 52 *N. Y. R.*, 445.)

5. The summons in such case must be made returnable in not less than three nor more than five days. A summons returnable upon the same day it is issued is irregular, and gives no jurisdiction to enter judgment upon default of appearance on the part of the occupant. (*Id.*)

## SUMMONS.

See SERVICE BY PUBLICATION.

*Smith* agt. *Matson*, ante, 118.

*Handley* agt. *Quick*, ante, 233.

## SUPPLEMENTAL ANSWER.

1. This action was commenced in September, 1871, issue was joined in November, 1871, and an affidavit of merits served December 30, 1871. The cause was on the calendar until January term, 1874, when an inquest was taken, and judgment entered on January sixteenth. In November, 1872, defendant instituted proceedings in bankruptcy, and, on April 18, 1873, received a discharge from all his debts, including the one for which this suit was brought. Defendant's attorneys, when advised by him of his proceedings to be discharged, understood him to instruct them that they should give the case no further attention, and they, acting upon this, allowed the inquest to be taken. The plaintiff had notice of such proceedings. The defendant having received his discharge, and fully relying on the same as ending the suit, paid no attention to it until he learned that judgment had been entered against him, when he applied to have the judgment set aside, and for leave to file a supplemental answer, set-

ting up his discharge. *Held*, that upon these facts, the order granting the application was proper; and *held*, further, that the order being discretionary, was not appealable. (*Hadley* agt. *Boehm*, 1 *Hun*, 304.)

## SUPPLEMENTAL COMPLAINT.

1. The plaintiff in this action, four months after the service of the answer, served an amended summons and a supplemental complaint, without obtaining any leave of court, either *ex parte* or on motion. *Held*, that this should be set aside; that the right to serve a supplemental complaint is not an absolute one, but rests in the sound discretion of the court, and it cannot be served without leave of the court first obtained. (*Soher* agt. *Fargo*, 1 *Hun*, 312.)

## SUPPLEMENTARY PROCEEDINGS.

1. The second subdivision of section 292 of the Code only authorizes the proceeding to compel an appropriation of such of the debtor's property, to the satisfaction of the judgment, as he unjustly refuses to apply thereto, when the judgment debtor resides in the same county with the officer. (*Driggs* agt. *Smith*, ante, 215.)
2. Where the affidavit upon which the order for examination is obtained under this subdivision does not show that the debtor resides in the same county with the officer, but resides out of the state, having a place of business here, the officer does not get any jurisdiction in the proceedings, notwithstanding the defendant's appearance without objection — much less does the officer have power to punish as for a contempt. (*Id.*)



## Digest.

## SUPREME COURT.

1. The only remedy strictly of right to a party sued by one of several claimants of the same debt or duty, which debt or duty he acknowledges and is ready to render, but, knows not to which of the claimants he ought of right to render it, is by action in the nature of a bill of interpleader. It is within the discretion of the court to refuse this relief upon summary application in an action against such party; and when granted it is equally within the discretion of the court, upon application and cause shown, to vacate it. (*Barry agt. Mut. Life Ins. Co.*, 53 N. Y. R., 725.)

## SURETY.

1. An error in a recognizance entered into in December, 1873, in describing the next term of the court of general sessions as one to be held on the first Monday of January, 1873, instead of 1874, was a mistake which could mislead no one, and especially not the surety. The year 1873 inserted after January might be regarded as surplusage. (*People agt. Welch*, ante, 420.)

## T.

## TAXES AND ASSESSMENTS.

1. Where the assessors of a town or towns, under and in pursuance of the provisions of the Laws of 1846 (*Laws of 1846*, p. 466) assess the amount of rents reserved in any leases in fee, chargeable upon lands within such towns payable in money, which rents shall be assessed to the person entitled to receive the same as personal estate for the purpose of taxation, at a principal sum, the interest of which at the legal rate per annum shall produce a sum equal to such annual

rents, precisely as they are required to assess them by said act, the board of supervisors of the county have no power or authority to change or correct, in any manner, such assessments, although the owner of the rents was a non-resident of either town. (*Youmans agt. Board of Supervisors*, ante, 24.)

2. Held, that the relator having been assessed, as he should have been, according to the act of 1846, the assessors could not have lawfully reduced his assessments if he had been a resident of their town, and had appeared before them on the day they reviewed their assessments, although the assessments against him were unjust, by reason of the fact that the assessors, as shown by his petition and affidavits, had assessed all other personal property, and also all real property in their respective towns, at sums not exceeding one-third of the true value thereof. (*Id.*)
3. The statute in relation to the assessment of real and personal property considered and discussed, and the general mode of assessment condemned. There being no doubt that there is scarcely a town or ward in the state where the assessors do not violate their oaths by assessing the taxable property in their towns or wards, at sums much less than its true value, at about one-third or one-quarter of its true value; while the owner of rents reserved in leases in fee is compelled to pay the full value of such rents, without any remedy. (*Id.*)

## See STEAMSHIP COMPANY.

*Pacific Mail Steamship Co. agt. Comrs. of Taxes and Assessments*, ante, 164.

## TITLE.

1. Where the issue, in an action of trespass, is made by the plaintiff

## Digest.

and the trial is had upon the plaintiff's right to the possession of the premises, after his alleged non-payment of rent, the title to real property comes in question on the trial. (*Powers* agt. *Conroy*, ante, 84.)

2. And where the referee finds in favor of the plaintiff for twenty-five dollars damages upon disputed evidence as to the payment of rent, the plaintiff is entitled to the costs of the action. (*Id.*)

See COVENANTS.

*Trustees of Columbia College* agt. *Lynch*, ante, 273.

See MOHAWK RIVER.

*Orill* agt. *City of Rome*, ante, 398.

3. Although a defendant is not in the possession of premises, the plaintiff can maintain an action of ejectment under the provisions of the statutes, basing the right upon the claim of title made by the defendant. (*Becker* agt. *Howard*, ante, 423.)
4. Where the plaintiff brings ejectment for wild and unoccupied lands, it will have to be determined upon the question who, of the parties, plaintiff or defendant, has the best title to the premises. (*Id.*)
5. Where the defendants, purchasers of such premises at a comptroller's tax sale, and who took their title, the comptroller's deed, after the commencement of an action to foreclose an existing mortgage on the premises (the mortgagee never having been served with the requisite tax notice to redeem) and filing of *lis pendens*, under which foreclosure sale the plaintiff claimed title. (*Id.*)
6. Held, that as the proceedings to enforce the collection of the tax did not stay the foreclosure proceedings, and all proper and necessary parties were named in the bill, the purchasers at the tax sale lost their title on the foreclosure sale. (*Id.*)
7. The plaintiff, *prima facie*, made a sufficient title to recover as against the defendants, upon proving the patent from the state to Benjamin Chamberlain and mesne conveyances to himself. (*Id.*)
8. In this action, the defendant's title failed under the tax sale and proceedings, for the reason that the notice required to be published by the comptroller, in pursuance of section 61, chapter 425, Laws of 1855, is defective in not stating, as required by the act, that "unless such lands are redeemed by a certain day they will be conveyed to the purchaser." (*Becker* agt. *Holdridge*, ante, 429.)
9. The notice, as published, states that "the payment into the treasury of this state of the sum set opposite to each lot, piece or parcel of land will be required to redeem the same, respectively, at the expiration of the time for the redemption thereof, which will be on the 28th day of November, 1861." (*Id.*)
10. The proof on the question whether the title was out of the state when it gave its patent to Benjamin Chamberlain, in 1835, held to be much stronger in favor of the plaintiff that the state had become reinvested, than in the preceding case of *Becker* agt. *Howard* (ante, p. 423), just decided. (*Id.*)
11. The proof is presented and relied upon by the defendant in an action of ejectment, who is out of possession and without title to defeat a recovery by one who connects himself with the last grant by the state. The fact of a prior grant by the state is wholly unavailing to the defendant for the reason that he does not connect himself with such prior grant. (*Id.*)

## Digest.

12. Where owners of adjoining lands erroneously locate a line fence, twenty years' occupation up to such fence is sufficient adverse possession to enable the person whose deed does not cover the land to hold the same. (*Robinson agt. Phillips*, 1 S. C. R., 151.)

13. The refusal of the judge at circuit to charge the jury that the evidence did not show adverse possession, there being some evidence tending to show it, *held*, correct. (*Id.*)

## TRIAL.

## See MALICIOUS PROSECUTION.

*Newfield agt. Copperman*, ante, 87.

1. Plaintiff brought an equitable action to restrain a nuisance and for damages caused by such nuisance. Defendant demanded a trial by jury, which was granted. The jury found in favor of plaintiff for \$25 damages. The court then, upon the evidence given before the jury, found the facts relating to the equitable questions in the case and gave judgment for a perpetual injunction and \$25 damages. *Held*, that defendant was not entitled to a jury trial. In an equitable action for relief against the continuance of a nuisance, and where the demand of damages is a mere incident to the equitable relief, the action cannot be tried by the jury. (*Parker agt. Laney*, 1 S. C. R., 590.)

2. The commission of appeals did not hold to the contrary of this principle in *Hudson agt. Cary* (44 N. Y., 553). The head note stating that it did so is erroneous. (*Id.*)

3. *Held*, also, that the order having directed the cause to be tried by a jury the court could not, except with the consent of the parties,

solely upon the evidence taken before the jury, find the facts by which the right of the plaintiff to equitable relief was to be determined. (*Id.*)

4. Where a principle of law is correctly stated in a charge, the counsel has no right to require the court to charge an isolated proposition in language chosen by himself, or to charge it as an isolated proposition, if it is embraced in the charge given. (*Coleman agt. People*, 1 S. C. R., *Addenda*, 3.)

5. In an action for admeasurement of dower, the defense was that plaintiff had, by an ante-nuptial agreement, released her claim to dower. *Held*, that defendants were entitled to a trial by jury. (*Kinne agt. Kinne et al.*, 2 S. C. R., 393.)

6. A justice of the sessions, while sitting at a trial, was called as a witness in the cause, and gave material testimony. *Held*, that, while the justice was thus acting as a witness, the court was disorganized, and a conviction upon that trial was irregular. (*Dohring agt. People*, 3 S. C. R., 453.)

7. Plaintiffs, in their complaint, claimed to have been employed by the defendants as brokers, to sell a vessel. On the trial, plaintiffs failed to show original employment or a ratification of their acts done without authority. *Held*, that plaintiffs should have been nonsuited. (*Smith agt. Tyler*, 2 S. C. R., 669.)

8. Defendant made a draft on plaintiffs. The draft was accompanied by a bill of lading of some cheese consigned to plaintiffs. Plaintiffs accepted and paid the draft, and sold the cheese, which did not bring enough to meet the draft. In an action for the deficiency, the defense was that the cheese had been sold to plaintiffs' agent for the amount of the draft. Plaintiffs claimed to have received



## Digest.

- and sold the cheese on commission. Evidence was given tending to prove the allegations upon each side. *Held*, that a motion to dismiss the complaint was properly denied, and that the defendant not having requested the submission of the case to the jury, could not object, on appeal, to a verdict for plaintiff, found by direction of the court. (*Perren* agt. *Lewis*, 2 S. C. R., 661.)
9. In an action upon a promissory note, the complaint alleged a sale of certain stocks pledged as security and the application of the proceeds upon the note. The answer admitted the sale, but alleged that it was tortious, because made without a previous demand and notice, and claimed that plaintiff was liable for the conversion. Upon the trial, plaintiff proved, without objection that the stocks were sold at auction and bid off by himself; the sale was made without notice. The court held that there was no conversion, and gave judgment for the amount of the note. *Held*, no error. That defendant, not having objected upon the trial that plaintiff was precluded by the pleadings from showing there was no sale, had waived his right, and the court was justified in determining the case irrespective of the pleadings. That the sale was voidable at the election of defendant, and he having elected to treat it as illegal, there was no sale, and therefore no conversion. (*Bryan* agt. *Baldwin*, 52 N. Y. R., 232.)
10. The rule applicable to motions for a nonsuit, which requires the defendant to specify objections, which if specified could be obviated by proof, is equally applicable where the defendant becomes the actor in seeking to enforce a counter-claim. (*Isham* agt. *Davidson*, 52 N. Y. R., 237.)
11. Questions on cross-examination upon irrelevant subjects are in the sound discretion of the court, and the exercise of this discretion is not subject to review, save in cases of plain abuse and injustice. (*Lefler* agt. *Field*, 52 N. Y. R., 621.)
12. Where one party to an action, knowing the truth of a matter in controversy and having the evidence in his possession, omits to speak, every inference warranted by the evidence offered will be indulged in against him. (*Wylde* agt. *N. R. R. Co.*, 53 N. Y. R., 156.)
13. A misjoinder of parties-plaintiff is not a ground for dismissal of the complaint as to all the plaintiffs, if either has shown that he has a good cause of action. In such case the motion must be for a dismissal of the complaint of the plaintiff, in whom no right of action appears. (*Sinar* agt. *Canada*, 53 N. Y. R., 298.)
14. The right is given by section 264 of the Code to the justice presiding at a circuit, in all cases of trial by a jury, to reserve the case for further consideration upon the questions of law involved; and the circumstance that a verdict was directed by the court does not take the case out of the provisions of that section. (*Shelington* agt. *Howland*, 53 N. Y. R., 371.)
15. If, after timely objection of want of parties, the plaintiff does not bring them in, the complaint may, in the discretion of the court, be dismissed, but without prejudice to a new action. An unqualified judgment, dismissing complaint in such case for want of parties, is erroneous, and is subject to review. (*Sherman* agt. *Parish*, 53 N. Y. R., 483.)
16. The complaint should not be dismissed, even without prejudice, and plaintiff put to a new action, when the same end may be reached by allowing the cause to stand over, on such terms as are equitable,

## Digest.

until the plaintiff bring in the necessary parties. (*Id.*)

17. An objection to the evidence of a witness examined *de bene esse*, taken upon the examination, where it is not renewed and no objection is made upon the trial, is not available upon appeal. (*Martin* agt. *Silliman*, 53 N. Y. R., 615.)

18. Where, under section 261 of the Code, the court instructs a jury to find upon particular questions of fact, the questions to be submitted, and their form are matters within the discretion of the court, and a refusal to submit other or different questions, is not a ground for appeal. (*Hackford* agt. *N. Y. C. & H. R. R. Co.*, 53 N. Y. R., 654.)

## U.

## UNDERTAKING.

1. Where an appeal from a judgment rendered by a single judge of the marine court to the general term is taken by the defendant upon an undertaking staying proceedings under sections 334 and 335 of the Code, and the appeal, through the defects or laches of the defendant in serving the printed case and exceptions, is dismissed by the general term, it is an effectual dismissal within the terms of the undertaking, and the sureties become liable; although it does not operate as a bar to another appeal, if the time limited therefor has not elapsed. (*Wheeler* agt. *McCabe*, ante, 283.)
2. Ten days' notice before suit brought upon the undertaking, required by section 348 of the Code, of "the entry of the order or judgment affirming the judgment appealed from," does not apply to such a case, as the judgment was not affirmed, but the appeal was simply dismissed. (*Id.*)
3. A judgment of *reversal* by the court of appeals of a judgment of the general term of the court below, reversing a special term judgment appealed from, does not satisfy and discharge the obligations of the sureties on the undertaking given on the appeal from the special to the general term. (*Richardson* agt. *Kropf*, ante, 286.)
4. The plaintiff brought an action against one Hathorn, which resulted in a verdict for the defendant. Plaintiff appealed to the general term, where a new trial was granted. Upon an appeal from the order of the general term, granting the new trial, the defendant and another executed an undertaking, which provided, 1st. For the payment of all costs and damages which might be awarded against the appellant on said appeal, not exceeding \$500; 2d. For the amount directed to be paid, if the judgment appealed from, or any part thereof, should be affirmed; and, 3d. For the payment of all damages and costs which should be awarded against the appellant on said appeal. The court of appeals affirmed the order of the general term, and ordered judgment absolute for the plaintiff. *Held*, that the first part of the undertaking restricted the amount, secured by it, to a sum certain, which is specified; that the second was entirely inapplicable to the order appealed from, and should be considered stricken out as surplusage; that the third part was unrestricted in its terms, and, fairly interpreted, was broad and comprehensive enough to embrace all costs and damages which might finally be awarded against the appellant, and necessarily included the full amount of the judgment awarded by the court of appeals. As the action of the plaintiff in accepting the undertaking in suit instead of proceeding with the case, was for the benefit of the appellant, who was thereby relieved from the necessity of making a

## Digest.

motion to the court, it was *held*, that this furnished a sufficient consideration to support the undertaking. At the time of entering the judgment in the original action, an extra allowance was granted to the plaintiff. *Held*, that he was entitled to recover the same from the defendant in this action. (*Post* agt. *Doremus*, 1 *Hun*, 521.)

5. The undertaking required to be given by section 334 of the Code, does not of itself stay the proceedings in the court below; and the only way in which they can be stayed, after an order for a new trial has been made, is by a motion directly to the court for that purpose, where the proper terms can be imposed as to security. (*Id.*)

6. At the same time that the appeal was taken from the order granting a new trial, appeals were taken from two other orders in the action. *Held*, that the costs of those appeals were not included in the undertaking. (*Id.*)

## USURY.

1. A note was given in renewal of a usurious note, but was not signed by the borrower on the original note. *Held*, that the only consideration for the new note was to extend the time of payment of the usurious note, and it was a mere substitute for and equally usurious with it. (*Standish* agt. *Parmely*, 1 *S. C. R.*, 40.)

## V.

## VENUE

1. In this case, an application was made to change the venue, from the city and county of New York, to the county of Suffolk. The defendant, Mellen, resided in the city of New York, and the defendant,

Collins, who alone appeared and served an answer, resided in Suffolk county, the plaintiff and the remaining defendant being non-residents. *Held*, that the venue was properly laid; that the plaintiff had, under section 125 of the Code, the option of selecting the place of trial, as between the two defendants, and that the fact that Collins was the only defendant who appeared in the action, did not affect the question. The statute does not distinguish between those who appear and those who do not. (*Forehand* agt. *Collins*, 1 *Hun*, 316.)

## VERDICT.

1. A special term is justified in setting aside a verdict in favor of plaintiff and granting a new trial when such verdict is against the preponderance of evidence, and there is reason to believe that the jury was misled by prejudice or labored under a misapprehension as to the facts. (*Burlew* agt. *Hubbell*, 1 *S. C. R.*, 235.)

## VERIFICATION.

1. The provision of section 157 of the Code, authorizing the omission of a verification of a pleading when an admission of the truth of the allegation might subject a party to a prosecution for a felony; also the provision of the act of 1854 "in relation to pleadings in courts of record" (§ 1, *chap. 75, Laws of 1854*), which authorizes the omission of such verification where the party would be privileged from testifying as a witness as to the truth of any matter denied by such pleadings, are applicable only to cases where allegations coming within the exceptions are contained in the pleadings to be answered. They do not extend to cases where new matter in avoidance, or where a counter-claim is set up, contain-



## Digest.

ing allegations accusing the pleader of a felony, or as to which he would be privileged from testifying. (*Fredericks* agt. *Taylor*, 52 *N. Y. R.*, 596.)

## W.

## WAIVER.

1. The assent of a party to a statute affecting his property is a waiver of his right to question the constitutionality of the act. Such assent need not be in writing, but may be evinced by acting under it, and seeking and accepting benefits thereby conferred upon him. (*Houston* agt. *Wheeler*, 52 *N. Y. R.*, 641.)

## WILL.

1. Although there is no *trust term* granted to the executors in a will, in words, such a term will necessarily be implied where the directions are to sell the real estate and convert all the testator's property into money, and to invest the proceeds for a term of years for the purpose of accumulation, and then to pay certain specified legacies, and thereafter to divide the residue, if any, to other legatees. (*Bean* agt. *Bowen*, ante, 306.)
2. Such directions impose active duties upon the executors, as *trustees* of the estate; as much so as though the testator had, in terms, described them as such in the will. They necessarily took the legal title and the right to the possession of the property. (*Id.*)
3. Even as to real estate, courts have implied an estate in the executors as trustees, although no estate was given them in words; and personal property is subject to trusts, as well as real estate. (*Id.*)

4. The clause in the will, which implies this trust estate given to the executors, cannot be sustained. It is limited to five and ten years, and such a term is unauthorized. (*Id.*)

5. The gifts of the legacies which are limited to take effect after a prescribed period of accumulation, and to be paid out of the accumulated fund as a part of the subject-matter of the gifts, being a period too remote, the gifts must fail. Legacies dependent upon a void trust fall with it. (*Id.*)

6. A gift is too remote unless, according to the intention of the testator, some person must necessarily be in existence with legal power to dispose of the property within the period limited by the rules of law. (*Id.*)

7. Gifts in another clause of the will being entirely separable from the void legacies and also from the trust scheme, may be sustained, for the statute against perpetuities only cuts off estates which are limited to take effect after the prescribed limit. (*Id.*)

8. As the trust must be declared void for contravening the statute of perpetuities, the real estate of the testator will descend to his heirs-at-law, and the personal estate must be distributed to the next of kin. (*Id.*)

9. The testator, father of the defendant, by his will devised to Marietta Miller "the farm on which John Fox now lives, \* \* \* bounded easterly and westerly by lands owned by M. D. Hall." (*Kendall* agt. *Miller*, ante, 446.)

10. John Fox then occupied, under a written agreement with the testator, about one hundred and forty-one acres of land, composed of three several pieces or purchases, containing, in round numbers, one hundred, eighteen and

## Digest.

twenty-three acres, respectively. The lot of eighteen acres, lying between the others, bounded north-erly by the hundred acres, on the south-easterly corner by the twenty-three acres, which is a long narrow strip extending to the south. A small portion only of each of the two smaller lots were cultivated and used with the one hundred acres; the remainder was wood-land. The one hundred acres upon which John Fox resided contained all the buildings. Fox maintained the fences around all the lots. (*Id.*)

11. The question was whether the devise included only the one hundred acres, or the three parcels. *Held*, that under the circumstances surrounding the testator at the time, he undoubtedly intended to and did devise all the land used and occupied by John Fox to his daughter Marietta Miller, the defendant, and that no portion of the one hundred and forty-one acres could be partitioned in this action. (*Id.*)
12. One named as executor in a will may be a witness before the surrogate on its probate. One, to whom a legacy is left thereby, may also be a witness. (*Harper* agt. *Harper*, 1 S. C. R., 351.)
13. The testator's correspondence, his manner of conducting business, and the character of the will itself, *held* to be stronger evidence of the testator's capacity than the opinions of experts. (*Id.*)
14. Costs of appeal refused when all parties have been unsuccessful on a cross appeal. (*Kiah* agt. *Grenier*, 1 S. C. R., 388.)
15. A testator cannot, by obliterations, partially revoke a will duly executed. (*Quinn* agt. *Quinn*, 1 S. C. R., 437.)
16. The attestation clause was simply: "Witness by us this 10th day of January, 1873." It was shown that the testator told the witnesses that the paper in question was his will and requested them to sign as witnesses, which they did. *Held*, that the will was properly executed. (*Conboy* agt. *Jennings*, 1 S. C. R., 622.)
17. On the probate of a will it appeared that neither of the subscribing witnesses thereto saw the testatrix sign it, and to neither of them did she acknowledge that she had signed it, and neither of them saw her name upon it. One of the witnesses testified that S., who drew the will, and called him to witness it, said to him, in the presence of testatrix, holding out to him a paper so folded that he did not see the signature, "that is Mrs. Bell's will," and requested him to sign his name. The testatrix said nothing and did nothing, so far as he remembered. The other witness testified that S. had desired him to come and witness Mrs. Bell's will; that when he went into the room a paper was handed to him, and he signed it; that nothing was said in Mrs. Bell's presence about its being a will. S., who drew the will, did not remember that he was present when it was executed. *Held*, that the will was not executed and published in the manner required by the statute, and that the decree of the surrogate admitting it to probate must be reversed. (*Baker* agt. *Woodbridge*, 1 S. C. R., *Addenda*, 11.)
18. In proceedings to prove a will, the evidence showed that the will was read in the presence of the testator and the subscribing witnesses by a person who, at the time, asked the witnesses to witness the execution. The testator then subscribed the will, and the witnesses at the same time signed their names to attest the execution. *Held*, that there was sufficient proof of the due execution

## Digest.

of the will. (*Belding* agt. *Leitchardt*, 2 S. C. R., 52.)

19. Although the request to witness, the execution and the publication of a will are distinct acts in their nature, their performance may be joint or connected. A single sentence uttered by the testator may import both a request to attest the execution and a publication. (*Id.*)

20. Whether or not the heir-at-law can maintain an action for the purpose of procuring a construction of the testator's will, *quere. Semble.* That the right to maintain such an action in equity, is limited to the executors or trustees themselves, and the persons specially authorized to do so, under the act of 1853. (*Meserole* agt. *Meserole*, 1 Hun, 66.)

21. The proponents of a will hold the affirmative, and must establish its due execution under and in accordance with the statute of wills (2 R. S., 63, § 40). *In re Kellum*, 52 N. Y. R., 517.)

## WITNESS.

1. A judge at the trial has power of his own motion to close the *cross-examination* of a witness. And it will be held a wise discretion of the exercise of that power, where the judge orders the witness to leave the stand, after a large latitude has been given counsel, not only on direct cross-examination, but on recross-examination, to fully examine the witness, and after a suggestion from the judge that the subject has been exhausted, and the counsel reiterates again the same question which had been asked and answered several times. (*White* agt. *McLean*, ante, 193.)

2. Under the Revised Statutes, article 5, title 3, chapter 7, part 3, a party to an action has not an absolute right to examine any witness under this statute at any time be-

fore or after issue joined. (*Cheever* agt. *Saratoga County Bank*, ante, 376.)

3. The object of the statute is to *perpetuate* the testimony of a witness, whose evidence is material, and from age, non-residence or infirmity the party is in danger of losing if not perpetuated under this statute. (*Id.*)

4. The proceeding under this statute must be taken in entire good faith. And where it is intended to include in the examination more than one witness, the judge before whom the examination is to take place will, in his discretion, determine which are to be examined and which not. (*Id.*)

5. Plaintiff, for the purpose of opposing a motion, required the affidavit of D. as to facts within the knowledge of D. He applied to D. several times upon successive days, but D. each time declined to make the affidavit until he could consult his counsel. *Held*, sufficient to authorize an order for the examination of D. under Code, section 401. (*Rogers* agt. *Durant*, 2 S. C. R., 676.)

6. A party cannot interfere to prevent the procuring of an *ex parte* affidavit by his adversary. Objections to the contents of the affidavit, or to the mode of procuring it, must be made when the affidavit is sought to be used. The witness having appeared, and having submitted to the examination without objection, *held*, that it was afterward too late for him to initiate proceedings to set aside the order, on the ground of insufficiency of the affidavit on which it was granted. (*McCue* agt. *Tribune Association*, 1 Hun, 469.)

## WRIT OF ERROR.

1. Where a prisoner on a writ of error did not have a judgment



## Digest.

record made up which would show the proceedings at the trial, but contented himself with a return containing the indictment, testimony, charge of court, verdict and sentence; *held*, that the court could not interfere with the result, upon the ground, that certain matters necessary to give validity to the proceedings were omitted, the fact of such omission not appearing by the return. (*Dent* agt. *People*, 1 *S. C. R.*, 655.)

1. A writ of error brings before the court only the record and excep-

tions taken, and it is not competent for it to weigh the evidence, or pass upon the correctness of the verdict of the jury. (*Wood* agt. *People*, 1 *Hun*, 381.)

2. A writ of error allowed after judgment, and before the escape of a prisoner, will not be quashed on motion of the people, though it appear that after the allowance of such writ, the prisoner escaped and fled the jurisdiction of the court. (*People* agt. *Sharkey*, 1 *Hun*, 300.)

# INDEX.

<b>A.</b>	
<b>AFFIRMANCE.</b>	
	<small>PAGE.</small>
By court of appeals — Sanford agt. White .....	96
<b>AGREEMENT.</b>	
To raise crops on shares — when nullified by a sale of the farm without reservation .....	481
<b>APPEAL.</b>	
Under the United States bank- rupt act, what decrees and judgments are interlocutory, and what are final .....	206
Court of appeals will dismiss where motion is in discretion of the court below — to set aside report of referee for his misconduct.....	354
From justice's court on question of law only sufficiency of no- tice.....	408
To court of appeals, where less than \$500 involved, when mo- tion for leave to appeal under act of 1874 will be denied....	535
<b>ARREST.</b>	
When defendant may be arrest- ed on civil process, although fraudulently brought within the jurisdiction of our courts,	71

<small>PAGE.</small>	
Discharge from — when waived by laches—personal privilege,	415
<b>ASSESSMENTS.</b>	
Of rents reserved in leases in fee — statutory requirements,	34
<b>AUDITING ACCOUNTS, N. Y.</b>	
When mandamus will issue re- quiring auditor to act...	368; 370
When alternative mandamus, and claim may be inquired into.....	382
<b>B.</b>	
<b>BANKRUPTCY.</b>	
Jurisdiction of circuit court United States to hear an orig- inal bill on the merits after neglect of assignee to appeal from the district court under the bankrupt act.....	108
<b>BONDS.</b>	
Stolen, purchaser in good faith for value, when protected....	330
<b>BREACH OF CONTRACT.</b>	
When injunction will be granted for protection.....	32

## Index.

C.	PAGE.
<b>COMMON CARRIERS.</b>	
Their liability for goods lost while on deposit at the end of their line.....	292
<b>COMPROMISE AND SETTLEMENT.</b>	
When deliberately made between the parties to a judgment, and the payment and acceptance of a specified sum, will be upheld by the court..	439
<b>CONSTITUTIONAL LAW.</b>	
The act of 1870, relating to the appointment of commissioners for opening streets, &c., in the city of Albany, held unconstitutional.....	244
Tax levy act of 1869, in reference to New York city, not unconstitutional .....	491
Act of 1872, in reference to improvement of Fourth avenue, New York, not unconstitutional .....	494
Act of 1873, in reference to non-resident corporation, not unconstitutional .....	520
<b>CONVEYANCE OF REAL ESTATE.</b>	
For a fair consideration to a general creditor, when upheld as against judgment creditors,	67
<b>COSTS.</b>	
When defendant not entitled to an extra allowance, although a difficult trial.....	11
When entitled to an extra allowance for frivolousness of demurrer.....	78
When awarded to plaintiff in action of trespass, on title to real property coming in question.....	84
Extra allowance on appeal from a decree of a surrogate's court affirmed .....	225
<b>COVENANTS RUNNING WITH THE LAND.</b>	
When want of privity of estate makes them inapplicable ....	273
<b>D.</b>	
<b>DAMAGES.</b>	
On dissolution of injunction — in case of landlord and tenant — report of referee.....	474
<b>DISCHARGE IN BANKRUPTCY.</b>	
Its effect — remedy of creditor whose rights are affected ...	489
<b>DIVORCE.</b>	
Application to set aside decree for fraud — notice of motion to plaintiff's administrator, insufficient .....	240
Averments necessary as to time and place of the commission of the adultery charged ....	253
<b>E.</b>	
<b>EJECTMENT.</b>	
When it does not lie to dispossess from existing easement or servitude.....	75



## Index.

ELECTION OF DEFENSES.	PAGE.	EXTRADITION.	PAGE.
When court no authority to require it.....	62	When defendant acquitted of the crime for which he was extradited, he is entitled to his freedom to return to his native place.....	385
EQUITY.		EXTRA ALLOWANCE.	
When equitable rule applied to void a conveyance made between husband and wife under a mistake of fact, and false representations .....	432	Of costs, based on stipulation of the amount of recovery, before the trial .....	479
EVIDENCE.		F.	
When offered to prove fraud in the sale of property — error,	62	FACTS.	
Admissibility of, to prove fact of ownership of property....	80	Found by a referee against undisputed evidence, will authorize a new trial .....	1
Where book of account of a firm allowed in favor of surviving partner — special agreement — defective work received and retained.....	97	G.	
Conflicting, on a question of fact, when court will decide, where not requested at the trial to submit it to the jury .....	360	GUARANTY.	
EXAMINATION OF PARTY.		Of payment and collection of a note, construction of.....	188
By adverse party not authorized under section 401 of the Code — but under section 389.....	412	H.	
EXCEPTIONS.		HABEAS CORPUS.	
To charge of the court generally, not good where part of the charge is correct.....	193	When custody of child will be taken from the father and placed in a charitable institution.....	170
EXEMPT PROPERTY.		I.	
From execution under act of 1842, but for the proviso in that act .....	145	IN BANKRUPTCY.	
		When a claim for rent not provable after filing petition .....	37

## Index.

INJUNCTION.	
	PAGE.
On assessment of damages, on dissolution, judgment cannot then be entered against the sureties .....	289
INSURANCE.	
Reinsurance of a primary company — when reinsurer liable for loss .....	43
INSURANCE COMPANIES.	
Formed under the general act of 1853, cannot be proceeded against for violation of duty, except under the provisions of that act... ..	450
J.	
JANITOR.	
Not an officer but an employe..	491
JOINT JUDGMENT DEBTORS.	
Assignment of the judgment to a firm of which one is a member, satisfies it as to the other,	228
When one summoned to show cause under section 375 of Code, cannot set up as a defense the statute of limitations,	231
JUDGMENT OF DIVORCE.	
When entered without application to the court, a nullity...	90
JURISDICTION.	
Of a court of record of another state, may be inquired into, and judgment therein rendered may be set aside for want of jurisdiction .....	469

L.	
LANDLORD AND TENANT.	
	PAGE.
Liability of monthly tenant for rent, where premises abandoned within the year.....	20
LEASE.	
Containing an agreement to execute a further instrument, to give a lien on furniture, &c., may be enforced in equity — but with proper notice and diligence .....	201
LUNATIC OR IDIOT.	
When a stranger may be appointed a committee of the person and estate .....	148
M.	
MANDAMUS.	
When will issue to compel payment by New York city officers to crier of court .....	59
To compel judge to settle bill of exceptions, when not allowed,	160
When writ may be amended — when plea of no appropriation not properly interposed to the writ — when charge of fraud in return not available ..	370
When alternative will issue and claim may be inquired into..	382
When will be issued against auditor and comptroller of city of New York to compel payment of a claim which has been audited by the board of supervisors.. ..	457

## Index.

	PAGE.	NON-RESIDENT CORPORATION.	PAGE.
When peremptory will issue to compel mayor of New York to countersign a warrant . . . .	494	When they may lay the venue in this state, in action by them, 520	
MECHANICS' LIEN.		NOTE BROKERS.	
Owner not liable where his interest in premises accrued after contracts with claimants were made . . . . .	173	When amount for which note sold under a mistake of fact, can be recovered back . . . . .	518
MISTAKE.		O.	
As to the year in a recognizance requiring defendant to appear, when not material . . . . .	419	ORDER FOR PUBLICATION.	
MOHAWK RIVER.		Of summons — jurisdiction — property in the state — sufficiency of affidavits . . . . .	283
Title to, in the state — navigable — mill-dam a nuisance — right by prescription denied . . . . .	398	P.	
MORTGAGE FORECLOSURE.		PARTIES.	
By an executrix — offset not allowed against moneys accrued after death of testator . . . . .	242	In interest only are now recognized in an action . . . . .	1
N.		PARTNERSHIP.	
NEGLIGENCE.		Limited, rights and liabilities of all the partners — practice in its formation . . . . .	394
Causing death on a railroad, when criminal acts of third persons exonerate the railroad, 256		A specific interest in the profits as profits, constitutes a partnership as to creditors . . . . .	524
NEW TRIAL.		When on dissolution the name of the old firm may be used — when "& Co." may be used by a single member of a former firm . . . . .	532
Granted after trial of action for malicious prosecution in part and libel in part . . . . .	87	PERPETUATING TESTIMONY.	
Vol. XLVII.		Examination of witnesses in the discretion of the judge . . . . .	376
82			



## Index.

PLACE OF TRIAL.	S.
Designated in the complaint — when it must control as to the trial of an issue of law only.. 466	SALARIES OF CITY OFFICERS.
POWER OF ATTORNEY.	When act of the legislature does not authorize their payment, 277
When confers more than a mere naked power upon the attor- ney..... 358	SALE OF MINING COMPANY STOCK.
PROMISSORY NOTE.	Proceedings when irregular and set aside..... 218
Obtained from the maker by fraud — his liability..... 13  When transferred toward pay- ment of a precedent, holder for value protected..... 360	SHERIFF'S FEES.
PUBLICATION OF SUMMONS.	What are chargeable — regu- lated by statute..... 263
Absconding debtor — jurisdic- tion of the court to issue the order ..... 118	SPECIFIC PERFORMANCE.
R.	Extension of time — when ac- tion will not lie..... 379
REFEREE.	STARE DECISIS.
When his misconduct with one of the parties, nullifies his re- port and judgment... .. 350	The doctrine should not be de- parted from except in extreme cases..... 176
REFEREE'S REPORT.	STATUTE OF LIMITATIONS.
Made in a foreign country — sent here and filed, when not void for want of jurisdiction, 188	Discovery of fraud within six years — requisite notice ..... 1
REVIVAL OF DEBT.	SUPPLEMENTARY PROCEED- INGS.
After a discharge in bankruptcy — new promise — when in- sufficient..... 489	Under section 292, subdivision 2, of the Code — want of juris- diction — contempt ..... 215
	SUPPLEMENTAL COMPLAINT.
	Cannot be served without leave of the court ..... 288

## Index.

T.	V.
TAXATION.	VOLUNTARY PAYMENT.
PAGE.	PAGE.
Of the ships of a steamship company doing business on Pacific ocean, when should be taxed here ..... 162	Of a promissory note to owner when valid, although a claim by a receiver ..... 52
TAX TITLE.	W.
Under comptroller's tax sale; when insufficient ..... 422, 428	WITNESS.
U.	Power of judge at the trial to stop cross-examination ..... 193
UNDERTAKING.	WILL.
When dismissal of appeal by general term for not serving case renders sureties liable... 283	Construction — implied trust in executors — clause void for illegal accumulation ..... 306
A reversal by court of appeals of general term judgment reversing special term judgment, renders the sureties liable on undertaking from special to general term ..... 286	Construction of a clause devising a farm of three several parcels of land, as one farm ... 445



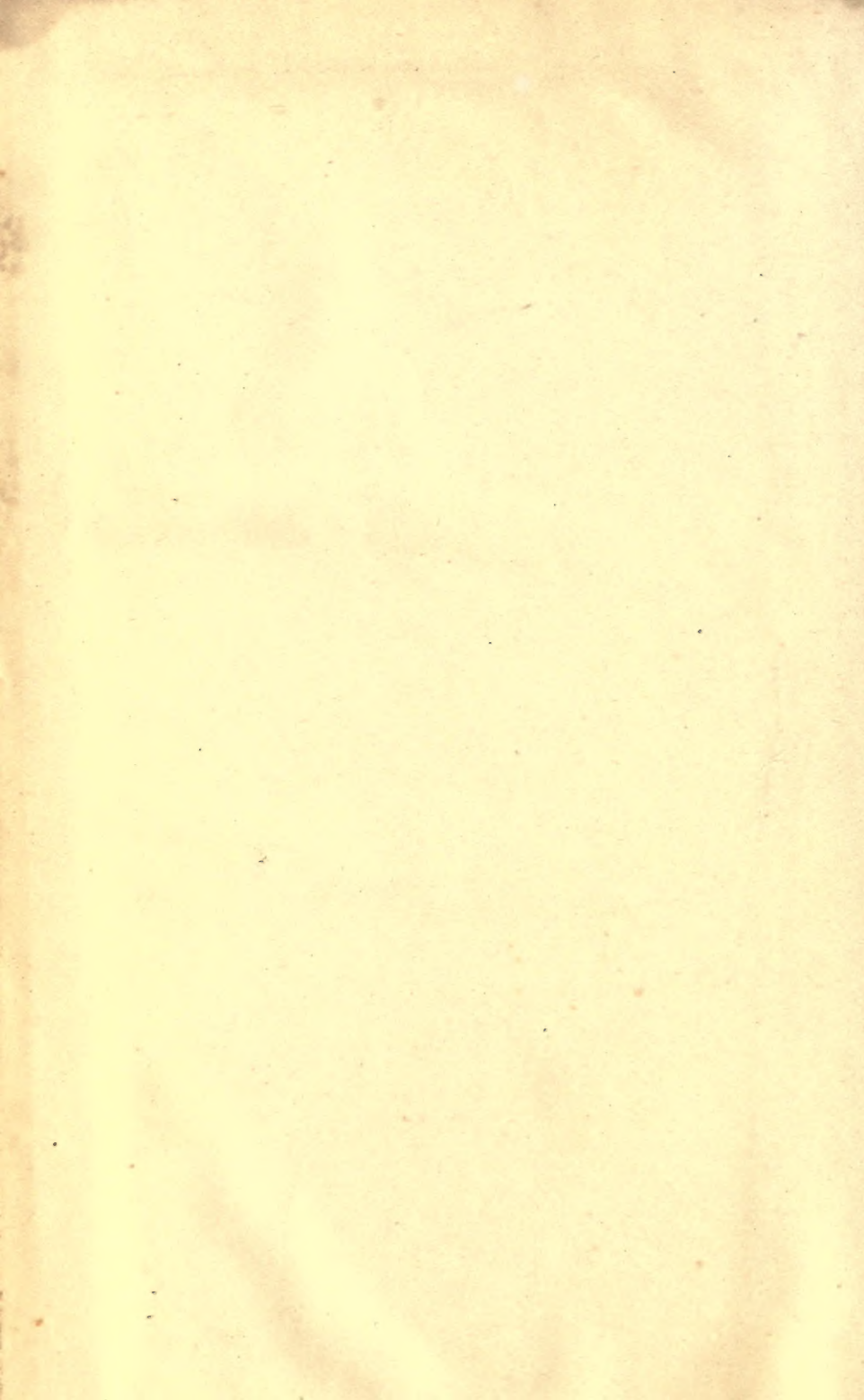












UC SOUTHERN REGIONAL LIBRARY FACILITY



**A** 001 164 325 1



